80-6749

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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GARY X. NELSON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the circumstantial evidence here was sufficient to permit any rational trier of fact to convict petitioner?
2. Whether the evidence was sufficient to permit any rational trier of fact to exclude every reasonable hypothesis save that of petitioner's guilt, as required by Georgia law?
3. Whether the Georgia statute permitting a death sentence if a murder is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" (Ga. Code Ann. § 27-2534.1(b)(7) ("section (b)(7)") is unconstitutionally vague and overbroad, thus conferring unbridled sentencing discretion upon the jury in violation of the Eighth and Fourteenth Amendments?
4. Whether section (b)(7) was unconstitutionally applied on the facts of this case?
5. Whether the trial court's vague and overbroad jury charge unconstitutionally conferred unbridled sentencing discretion on the jury?
6. Whether petitioner's right to due process was violated by displaying to the jury five color photographs, found by the trial court to be "highly inflammatory" during the guilt phase of the trial, immediately before the jury retired to consider imposition of the death penalty?

7. Whether petitioner's right to due process was violated when the prosecutor read to the jury a lengthy transcript of a police interrogation of petitioner containing material, unfounded factual assertions, assumptions, and innuendo that were known by the prosecutor to be false when used?

TABLE OF CONTENTS

	Page
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural History	3
B. Statement of Facts	3
1. The Guilt Phase	4
2. The Penalty Phase	9
C. How the Federal Questions Were Raised and Decided Below	11
1. The Sufficiency of the Evidence	11
2. The Constitutionality of Section (b)(7)	12
3. Evidence at Trial	13
REASONS FOR GRANTING THE WRIT	14
I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER DEFENDANT WAS DENIED DUE PROCESS BY A CONVICTION ON INSUFFICIENT EVIDENCE	14
A. No Rational Trier Of Fact Could Have Found Proof Of The Essential Elements Of Each Crime Beyond A Reasonable Doubt	15
B. The Evidence Presented At Trial Was Such That No Rational Trier Of Fact Could Have Found That The Requirement Of The Georgia Circumstantial Evidence Statute Was Satisfied Beyond A Reasonable Doubt	25
II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GEORGIA'S STATUTORY BASIS FOR IMPOSING DEATH HERE IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD ON ITS FACE OR AS APPLIED IN THIS CASE	28
A. Section (b)(7) Is Unconstitutional On Its Face	29
B. Section (b)(7) Was Unconstitutionally Applied On The Facts Of This Case	51

TABLE OF CONTENTS (cont'd)

Page

1. The Vague and Overbroad Language of Section (b)(7) Conferred Unbridled Sentencing Discretion on the Jury, In Violation of the Eighth and Fourteenth Amendments..... 51
2. The State's Evidence Wholly Failed to Establish That Section (b)(7) Applied..... 55
3. The Trial Court's Penalty Charge Concerning Jury Unanimity Was Unconstitutional..... 57

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE JURY, CONFRONTED DURING THE PENALTY PHASE WITH GRUESOME COLOR PHOTOGRAPHS EXCLUDED FROM THE GUILT TRIAL BECAUSE THEY WERE INFLAMMATORY, IMPOSED THE DEATH SENTENCE ON THE BASIS OF EMOTION, PASSION, OR CAPRICE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS..... 63

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION INTO EVIDENCE OF PETITIONER'S PRETRIAL STATEMENT TO INVESTIGATORS CONSTITUTED GROSS PROSECUTORIAL MISCONDUCT CREATING SUCH FUNDAMENTAL UNFAIRNESS AS TO DENY PETITIONER DUE PROCESS OF LAW..... 66

A. By His Use of The Statement, The Prosecutor Knowingly Placed Before The Jury False Evidence, Inadmissible Evidence, And Unfounded Assumptions And Innuendo..... 67

B. The Prosecutor's Use Of The Statement So Infected The Trial With Unfairness As To Deny Petitioner Due Process of Law..... 76

CONCLUSION..... 83

TABLE OF AUTHORITIES

Cases:	Page
Alcorta v. Texas, 355 U.S. 28 (1957).	77,77n
Apodaca v. Oregon, 406 U.S. 404 (1972).	59n
Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976)	32n,44
Ballew v. Georgia, 435 U.S. 223 (1978).	61
Banks v. State 237 Ga. 325, 227 S.E.2d 380 (1976), cert. denied, 430 U.S. 975 (1977)	46,47n
Beck v. Alabama, 447 U.S. 625	28,38n,53, 55,59n,60, 62n,65,66
Bell v. Ohio, 438 U.S. 637 (1978)	54
Berger v. United States, 295 U.S. 78 (1935)	78
Blake v. State, 239 Ga. 292, 236 S.E.2d 637, cert. denied, 434 U.S. 960 (1977)	35,47n,62n
Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979), cert. denied, 446 U.S. 970 (1980).	47n
Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980).	41n
Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981).	48n
Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988 (1980).	48n
Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, 101 S. Ct. 956 (1981).	48n
Chambers v. Mississippi, 410 U.S. 284 (1973).	62n
Cobb v. Wainwright, 609 F.2d 754 (5th Cir.), cert. denied, 447 U.S. 907 (1980).	81

TABLE OF AUTHORITIES (cont'd)

Cases:	Page
Commonwealth v. Batty, 482 Pa. 173, 393 A.2d 435 (1978)	66
Cox v. Louisiana, 379 U.S. 559 (1965)	59n
Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977), cert. denied, 445 U.S. 946 (1980)	47n
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	67,76, 78
Duncan v. Louisiana, 391 U.S. 145 (1968)	59n
Edelman v. California, 344 U.S. 357 (1953)	45n
Fair v. State, 345 Ga. 868, 268 S.E.2d 316, cert. denied, 101 S. Ct. 407 (1980)	58,59, 59n,60n
Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980)	73
Fulghum v. State, 246 Ga. 184, 269 S.E.2d 455 (1980)	56n
Furman v. Georgia, 408 U.S. 238 (1972)	29,30,33, 34,37,41, 46,51,52, 53,54,55
Gardner v. Florida, 430 U.S. 349 (1977)	38n,60, 62n,65,66
Germany v. State, 235 Ga. 836, 221 S.E.2d 817 (1976)	26n
Giglio v. United States, 405 U.S. 150 (1972)	75,77,81
Godfrey v. Georgia, 446 U.S. 420 (1980)	passim
Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), rev'd, 446 U.S. 420 (1980)	47n
Grayned v. City of Rockford, 408 U.S. 104 (1972)	44,51
Gregg v. Georgia, 428 U.S. 153 (1976)	passim
Hamric v. Bailey, 386 F.2d 390 (4th Cir. 1967)	79
Hance v. Georgia, 101 S. Ct. 796 (1980)	37n
Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 101 S. Ct. 796 (1980)	passim

TABLE OF AUTHORITIES (cont'd)

Cases:	Page
Hardy v. State, 245 Ga. 272, 264, S.E.2d 209 (1980), vacated, 101 S. Ct. 523 (1981)	48n
Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977).	35,46,47n
Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977).	33n,62n
High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981)	48n
Holcomb v. State, 130 Ga. App. 154, 202 S.E.2d 529 (1973).	66
Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925 (1979)	47n
House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910 (1976)	47n
Huffman v. United States, 297 F.2d 754 (5th Cir.), cert. denied, 370 U.S. 955 (1962).	61
Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969), aff'd sub nom. Imbler v. California, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970).	78
Irvin v. Dowd, 366 U.S. 717 (1961)	65
Jackson v. Virginia, 443 U.S. 307 (1979)	14,15, 28,56,
Johnson v. Louisiana, 406 U.S. 356 (1972).	59n
Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978)	47n
Jurek v. Texas, 428 U.S. 262 (1976)	54
King v. United States, 372 F.2d 383 (D.C. Cir. 1966)	78,79
Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980).	56n
Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978).	47n

TABLE OF AUTHORITIES (cont'd)

Cases:	Page
Lockett v. Ohio, 438 U.S. 586 (1978)	54
Mapp v. Ohio, 367 U.S. 643 (1961).	80n
Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966).	66
McCorquodale v. State, 233 Ga. 369, 211 S.E. 2d 577 (1974), cert. denied, 428 U.S. 910 (1976).	47n
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Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978)	78
Miller v. Pate, 386 U.S. 1 (1967)	69,77
Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976)	59,59n, 60,60n, 61
Mooney v. Holohan, 294 U.S. 103 (1935).	77
Moore v. Dempsey, 261 U.S. 86 (1923).	65
Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978), cert. denied, 441 U.S. 967 (1979).	47n
Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, supp'l op., 245 Ga. 881, 268 S.E.2d 351, cert. denied, 101 S. Ct. 407 (1980)	48n
Napue v. Illinois, 360 U.S. 264, (1959)	77,77n, 81
Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981).	passim
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	44
Patrick v. State, 245 Ga. 417, 265 S.E.2d 553, vacated, 101 S. Ct. 522 (1980)	48n

TABLE OF AUTHORITIES (cont'd)

Cases:	Page
Presnell v. Georgia, 439 U.S. 14 (1978)	53,57
Proffitt v. Florida, 428 U.S. 242 (1976)	37n,54
Pyle v. Kansas, 317 U.S. 213 (1942)	77
Raley v. Ohio, 360 U.S. 423 (1959)	59n
Roberts v. Louisiana, 428 U.S. 325 (1976)	54
Roberts v. Louisiana, 431 U.S. 633 (1977)	54
Sanders v. State, 97 Ga. App. 158, 102 S.E.2d 635 (1958)	26n
Smith v. Goguen, 415 U.S. 566 (1974)	38n,43
Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979), vacated in part, 446 U.S. 961 (1980)	47n
Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991 (1978)	62n
Street v. State, 415 Ga. 707, 227 S.E.2d 750, vacated, 429 U.S. 995 (1976)	46
Strickland v. State, 247 Ga. 219, 275 S.E.2d 29 (1981)	48n
Thomas v. State, 234 Ga. 615, 216 S.E.2d 859 (1975)	62n
Thomas v. State, 245 Ga. 688, 266 S.E.2d 499, vacated, 101 S. Ct. 523 (1980)	48n
Thompson v. Louisville, 362 U.S. 199 (1960)	28
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United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978)	77n,81
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TABLE OF AUTHORITIES (cont'd)

	Page
Cases:	
United States v. 37 Photographs, 402 U.S. 363 (1971)	37n
Vachon v. New Hampshire, 414 U.S. 478 (1974)	62n
Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977)	47n
Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978). . .	73
Westbrook v. Balkcom, 49 U.S.L.W. 3371 (1980) (Stevens, J., concurring in the denial of certiorari).	41n
Williams v. United States, 338 F.2d 530 (D.C. Cir. 1964)	61
Willis v. Balkcom, 49 U.S.L.W. 3786 (1981) (Marshall, Brennan, Stewart, J.J. dissenting from the denial of certiorari).	41
Witherspoon v. Illinois, 391 U.S. 510 (1968).	61
Wong Sun v. United States, 371 U.S. 471 (1963).	80n
Woodson v. North Carolina, 428 U.S. 280 (1976).	38n,54,
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	59n
Constitutional Provisions:	
U.S. Const. amend. V	67
U.S. Const. amend. VI	58,59, 59n,61
U.S. Const. amend. VIII	12,34,35, 51,52,58, 59,59n,61, 65
U.S. Const. amend. XIV.	12,15,35, 51,52,58, 59,59n,61, 65,79

TABLE OF AUTHORITIES (cont'd)

	Page
Statutes:	
28 U.S.C. § 1257(3)	2
Ga. Code Ann. § 24-3319	33n
Ga. Code Ann. § 26-1101	2
Ga. Code Ann. § 26-1305	10,10n,39, 40
Ga. Code Ann. § 26-2001	2
Ga. Code Ann. § 26-2002	2
Ga. Code Ann. § 26-3102	60
Ga. Code Ann. § 27-2503(b)	60
Ga. Code Ann. § 27-2534.1	2,11
Ga. Code Ann. §§ 27-2534.1(b)(1)-(10)	32
Ga. Code Ann. § 27-2534.1(b)(1)	32n
Ga. Code Ann. § 27-2534.1(b)(7)	passim
Ga. Code Ann. §§ 27-2537(c)(1)-(3)	55
Ga. Code Ann. § 27-2537(c)(1)	62n,65
Ga. Code Ann. § 27-2537(c)(2)	39
Ga. Code Ann. § 38-109	15,25,26
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TABLE OF AUTHORITIES (cont'd)

Page

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PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF GEORGIA

Petitioner Gary X. Nelson respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Georgia is reported at 247 Ga. 172, 274 S.E.2d 317 (1981) and is attached as Appendix A.*

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 27, 1981. The court denied a timely motion

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* Although a citation to the official report of the Nelson decision is available, the advance sheets of the official reporter are not available in New York City as of this writing. Therefore, the unofficial report is included in Appendix A and is cited throughout this petition.

for rehearing on February 24, 1981. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit, granted an extension of time to file the present petition for a writ of certiorari from April 24, 1981, to and including May 25, 1981. Because May 25, 1981, is a federal legal holiday, the final day for filing the petition is May 26, 1981, pursuant to Rule 29.1 of the Supreme Court Rules. The jurisdiction of this Court is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Georgia Code Annotated sections 24-3319, 26-1101, 26-1305, 26-2001, 26-2002, 26-3102, 27-2503(b), 27-2534.1, 27-2537(c), 38-109, 70-207(a), 70-207(c). These provisions are set forth in full in Appendix B to this petition.

STATEMENT OF THE CASE

A. Procedural History

After three grand juries failed to indict, a fourth grand jury indicted petitioner for the murder (Ga. Code Ann. § 26-1101), aggravated sodomy (Ga. Code Ann. § 26-2002), and rape (Ga. Code Ann. § 26-2001) of Valerie L. Armstrong. R 7-9.* A jury found petitioner guilty of all three crimes (R 53-55), and found that the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." R 53. See Ga. Code Ann. § 27-2534.1(b)(7).** The jury recommended a death sentence on the murder conviction. R 53. The trial court entered judgment sentencing petitioner to death on the murder conviction and to two consecutive life terms on the aggravated sodomy and rape convictions. R 55-60. The Georgia Supreme Court affirmed the convictions and sentences, Nelson v. Georgia, 247 Ga. 172, 274 S.E.2d 317 (1981), and denied a timely petition for rehearing.

B. Statement of Facts

This is not the typical death penalty case considered by this Court over the last five years; here, there has been no confession or incriminating statement by the petitioner or another admitted participant in the crime. Because the evidence was purely circumstantial and unconstitutionally thin, it is necessary to present a full statement of the facts shown at trial.

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* The record on appeal to the Georgia Supreme Court is designated by an "R" followed by the page number.

** Under Ga. Code Ann. § 27-2534.1(b)(7) (hereafter cited as "section (b)(7)"), the death penalty may be imposed if the jury finds that the "offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

1. The Guilt Phase

On Sunday morning, February 19, 1978, petitioner visited Ray McCray, the victim's stepfather, to borrow some automotive tools. TT 179-80.* Petitioner lived about half a block away from Mr. McCray, in a house that he had been sharing with Alphonso Swinton. TT 180-82. Mr. McCray decided to help petitioner, and the two spent the day working on a Volkswagen in petitioner's back yard. TT 180-81, 182. Mr. McCray went home in the late afternoon accompanied by petitioner, who soon returned to his own yard to continue working on his car. TT 182-84.

At dusk, as it was getting dark, Mr. McCray sent his seven year old son, Michael Armstrong, to petitioner's house with a drop cord so that petitioner could continue working after dark. TT 185, 218. Michael knocked on petitioner's door but there was no answer. He looked in the back yard but there was nobody there. Michael returned home where he saw his six year old sister, the victim, in her own back yard playing with another girl. TT 221, 223, 225-27.

Later that evening, around seven p.m., Mr. McCray became concerned because the victim had not returned home. TT 185-86. Mr. McCray and his other children searched for her in the neighborhood but did not find her. TT 186. Mr. McCray called the police around 10:30 p.m. TT 206, 214, 228-29.

Sabrina Williams, eight years old, was visiting her grandmother across the street from Mr. McCray's house on February 19. TT 297, 299-300. Her testimony at trial demonstrated that her perception and recollection of the day's events were inaccurate, incomplete, and unreliable. The night the victim

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* The trial transcript is designated by a "TT" followed by the page number.

disappeared, the victim's sister asked Sabrina if she had seen the victim. Sabrina said she had not seen the victim that day. TT 309-10.

Three days later, at a police interview on February 22, 1978, when Sabrina was "scared" (TT 322), and "very nervous because of her age" (TT 327), Sabrina for the first time said that she had gone to the store with the victim to buy some candy on February 19. TT 301-03, 325-26. Sabrina testified at trial that on the way back from the store the victim left Sabrina around dusk to go to what the victim referred to as her "uncle's house." Sabrina testified that that was "Al's house." TT 304-05. At a pretrial hearing on August 30, 1978 (TT 321), Sabrina testified that she saw the victim go into the back yard, but did not see anyone else in the yard:

> Question, "Whose back yard was she in?"
>
> Answer, "She was in Al's back yard."
>
> Question, "Was there anybody else in the back yard?"
>
> Answer, "I don't know. I ain't looked in the back yard."
>
> Question, "Did you see anybody before you left?"
>
> Answer, "No, I didn't look in there."
>
> Question, "Other than Valerie?"
>
> [Answer,] "No, nobody else."

TT 320. Sabrina's testimony at trial was different; at trial she said that she saw a man in the back yard, dressed in black. TT 305, 326.

Although it was "almost dark" when she claims to have seen someone in the back yard (TT 320), at the February 22 interview (when she was "scared" and "very nervous") she selected a

picture as possibly representing the person in the back yard. She was not sure that the person in the picture was the person in the yard: "No, I wasn't sure, 'cause it might have been another person" (TT 314); "I really wasn't sure, but it looked like him" (TT 318); "I wasn't sure" (id.); "No, I wasn't sure." Id. The picture that Sabrina selected was that of petitioner. TT 328. However, upon seeing petitioner at trial, she testified that petitioner was not the man she claimed to have seen in the back yard that day. TT 324. She did not see that person in the courtroom. TT 312, 315, 321.

At the February 22 interview, Sabrina also selected a second picture as representing an unidentified man she had seen on the corner by the store on the day the victim disappeared. TT 329-30.

The police found the victim's body in a ditch on the afternoon of February 20, 1978. TT 232-33. A pathologist testified that the victim died of a stab wound to the left side of the chest, which caused her to bleed to death "not long" afterwards. TT 293. The body had been raped and anally sodomized. TT 294. He said he "couldn't swear" that the body had been orally sodomized and, in fact, that there was "some doubt that there was oral intercourse." TT 294-95, 296-97. The prosecution introduced absolutely no evidence of the sequence of events surrounding the victim's death, nor anything indicating whether the murder was committed on February 19 or 20. There is no evidence as to whether the victim was killed first and later raped and sodomized, or raped and sodomized and then killed. If she was killed first, there is no evidence of how much later she was raped and sodomized.

A forensic serologist testified that a semen sample taken from the victim's coat came from a man with type O blood. Forty-four percent of the population, including the petitioner, has type O blood. TT 362-64, 369. The serologist testified that she could have conducted a further test on the semen sample that could have precluded petitioner as a suspect. She did not conduct that test. TT 375-76. The prosecution introduced no evidence as to the blood type of Mr. Swinton, petitioner's former roommate.

A microanalyst testified that a single hair removed from the victim's body was similar to or could have come from at the very least 120 people in the county, including petitioner. TT 337-44. The microanalyst agreed that 120 was an "off-the-wall figure" that "wouldn't be very accurate," and that the actual figure could run much higher. TT 343. The prosecution did not introduce any evidence as to whether the hair could have come from Mr. Swinton.*

The police found a broken knife handle wrapped in masking tape and a blade about 15 or 17 feet from the victim's body. TT 247-48. The police pieced the knife together, photographed it for identification (TT 247, 263), and then removed the tape to search for fingerprints on the handle (TT 248, 259), but found none on the tape, handle, or knife blade. TT 260. The serologist testified that she found human blood on the knife, but that there was an insufficient amount to perform blood typing procedures. TT 362. The prosecution introduced no evidence that this particular knife was used to kill or stab the victim, or was physically consistent with her wounds.

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* In its opinion below, the Georgia Supreme Court incorrectly stated that such evidence had been adduced. Nelson v. State, 247 Ga. 172, ____, 274 S.E.2d 317, 323 (1981). We discuss the significance of this error in Part I.B., infra.

Patricia Brown testified that when she was dating Alphonso Swinton, she had visited Swinton and petitioner at their house to cook chicken. TT 346-47. Ms. Brown identified a photograph of the knife that the police had pieced together as representing a knife that she had used to cut chicken at the house. She recalled that the knife was not sharp. TT 348-49. She could not remember the last time that she had seen the knife because she "hadn't been over there in a long, long time." TT 349. Ms. Brown examined only the photograph, not the actual knife.

Diane Knight lived with petitioner until December 1977. TT 525-26. She examined the knife found near the victim's body and testified that she had never seen it before and that it had never been in petitioner's house. TT 526-27, 545. Ms. Knight testified that she did most of the cooking and that she never saw Patricia Brown cook at petitioner's house. TT 528-29. Prior to trial, she told the police that a photograph of the knife depicted a knife that had once belonged to her father and that she had left it at petitioner's house. TT 527.* However, at trial she testified that she had made the former statement only because she had been kept in jail "for nothing, for three whole months" (TT 527), the police were questioning her about the knife "every other day" (id.), the police offered her a reward for identifying the knife (id.), the police threatened to charge her with killing the victim (TT 530, 542), and the police tried to bribe her. TT 543.

Bobby Butler, Diane Knight's brother, examined the knife found near the body and testified that he had never seen it before the police showed it to him during an interview on May 24, 1978, that it had never belonged to his father, and that he had frequently visited petitioner's house but had never seen the

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* Her father died sometime prior to trial. TT 553.

knife there. TT 552-57. Mr. Butler did tell the police that his father had owned a pen knife with a toothpick in the handle so that it would open faster, but said that black people in Savannah commonly put toothpicks in the handles of such knives for that reason. The knife found near the body had a toothpick in the handle. TT 559-60, 614-19, 624-25.

Petitioner testified that he did not kill, rape, or sodomize the victim. TT 581, 601. He frequently saw many children in the neighborhood, but he did not know or recognize the victim individually. TT 570, 579. He examined the knife found near the body and denied that it had ever been in his house. TT 573-74, 596.

2. The Penalty Phase

After being sequestered for three days of trial, the jury began its deliberations at the guilt phase on a Friday afternoon at 5:30 p.m. The jury returned with three guilty verdicts at 6:35 p.m. TT 669-70. The trial judge immediately commenced the penalty phase. The only evidence introduced during the half-hour penalty phase consisted of five photographs of the victim, which the trial court had excluded at the guilt phase as being inflammatory and prejudicial. TT 251-52.

The trial court then charged the jury on aggravating circumstances in the statutory language of section (b)(7), as described in more detail below. The jury retired for sentence deliberations at 7:10 p.m. and, evidently eager to avoid being sequestered for the weekend, returned with a death sentence at 7:50 p.m. TT 680. While quoting the literal language of

section (b)(7),* and explaining "aggravated battery" in the language of Georgia Code section 26-1305,** the trial court did not otherwise define aggravated battery or any of the other terms contained in section (b)(7): "outrageously or wantonly vile, horrible, or inhuman," "torture," and "depravity of mind." In addition to instructing the jury in the undefined language of section (b)(7), the court gave a broader, open-ended definition of what constituted aggravating circumstances: "Aggravating circumstances are those which increase the guilt or the enormity of the offense and add to its injurious consequences." TT 678.

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* The Court charged section (b)(7) as follows:

> Now, before you would be authorized to recommend the death penalty, you must determine whether, at the time the crime was commited, the following statutory aggravating circumstance existed beyond a reasonable doubt . . . . I quote: "The offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim."

TT 677.

** The Court described aggravated battery as follows:

> Now, a person commits aggravated battery when he maliciously causes bodily harm to another by depriving him or her of a member of her body or by rendering a member of her body useless or by seriously disfiguring her body or a member thereof.

TT 677. Ga. Code Ann. § 26-1305 defines the criminal offense of aggravated battery: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

The prosecutor argued to the jury that section (b)(7) was only one aggravating circumstance at issue in the case,* although the "guilt or enormity" language used in the trial court's charge is not a separate statutory aggravating circumstance under the Georgia death penalty statute. See Ga. Code Ann. § 27-2534.1.

The trial court also instructed the jury that it must unanimously agree upon one of three alternative "findings" as transcribed and given to it. In essence, the jury was forced to choose between finding that the crime fell within the precise statutory language of section (b)(7), or finding unanimously that "no aggravating circumstance" existed, despite the inflammatory pictures it had just been shown. See pp. 62-63, infra.

C. How the Federal Questions Were Raised and Decided Below

1. The Sufficiency of the Evidence (Point I, infra)

Petitioner challenged the sufficiency of the evidence on at least three occasions before the trial court,** and again

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* The prosecutor argued:

> The Judge is going to Charge you there are certain aggravating circumstances you must find before you can impose the death penalty and one of them's going to be that the crime of murder was committed in a wanton and willful total disrespect for human life, and that, Ladies and Gentlemen, is total disrespect of the highest and to the nth degree.

TT 674 (emphasis added).

** See Motion for a Directed Verdict, TT 515-22; Renewed Motion for a Directed Verdict, TT 627-28; Motion for a New Trial, R 62. See generally Transcript of Proceedings on Petitioner's Motion for a New Trial (May 9, 1980) [hereafter cited as "May 9 Transcript"] at 4-5.

on appeal to the Georgia Supreme Court. Brief on Behalf of Appellant ("Appellant's Brief") ¶¶ 1-3.* The Georgia Supreme Court held that "[t]he evidence, when viewed as a whole, is sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt." Nelson, 247 Ga. at ___, 274 S.E.2d at 320.

2. The Constitutionality of Section (b)(7) (Point II, infra)

Petitioner challenged the aggravating circumstance instructions in the trial court in a motion for a new trial on Eighth and Fourteenth Amendment grounds, arguing: (1) that the instructions "failed to adequately charge" the jury (R 68); (2) that "the jury was not given adequate guidance concerning standards governing their deliberation of Petitioner's sentence" (R 70); and (3) that "the charge should have included more language which would have given the jury a different or potentially different result than that of finding aggravated circumstances sufficient to impose the death penalty." (May 9 Transcript at 15). Petitioner also challenged the death sentence on the grounds that it was applied in an arbitrary and capricious manner (R 69), and was not supported by the evidence in this case. R 70; see generally May 9 Transcript at 15, 17-21, 23.

The May 9 proceedings were held ten days before this Court decided Godfrey v. Georgia, 446 U.S. 420 (1980). The May 9 Transcript reveals that trial counsel and the trial court were aware that Godfrey involved the issue of whether section (b)(7)

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* The pages of Appellant's Brief below are not numbered.

was unconstitutional on its face and as applied in that the vague and overbroad language conferred too much sentencing discretion on the jury. May 9 Transcript at 17-19. Although the trial court expressed an interest in having "more guidance on that" from the Georgia Supreme Court or the United States Supreme Court, id. at 18, the trial court nevertheless overruled the motion on May 9 and declined any briefing on the issue. Id. at 15; R 73.

After this Court decided Godfrey, petitioner renewed his challenge to the death sentence through an extraordinary motion for a new trial, on the same grounds as he presented in the earlier motion for a new trial, citing Godfrey. R 74-75. The trial court denied the motion. Supplemental Record at 4.

Petitioner challenged the death sentence on appeal to the Georgia Supreme Court on the same grounds that he raised before the trial court. Appellant's Brief ¶¶ 14, 19, 23, 25, 38. The Georgia Supreme Court affirmed the death sentence in general terms on the grounds that the Georgia death penalty statute is constitutional, 247 Ga. at ___, 274 S.E.2d at 323, and that "[t]he verdict is factually substantiated." Id. at ___, 274 S.E.2d at 323.

3. Evidence at Trial (Points III and IV, infra)

Petitioner objected to the admissibility of photographs of the victim's body at both the guilt phase (TT 251-52), and the sentence phase. TT 671-72. The trial court sustained the objection and excluded the evidence at the guilt phase (TT 251-52), but overruled the objection and admitted the photographs at the sentence phase. TT 671-72.

On appeal to the Georgia Supreme Court, petitioner argued that the trial court erred in admitting the photographs at the sentence phase. Appellant's Brief ¶ 27. The Georgia Supreme Court held that the trial court did not abuse its discretion in admitting the photographs. 247 Ga. at ___, 274 S.E.2d at 323.

Petitioner's counsel objected to the reading at trial of a transcript of petitioner's pretrial police interrogation, although counsel attempted to substitute the actual tape recording for the transcripts. Before the Georgia Supreme Court, petitioner's counsel claimed, inter alia, that "the use of the transcript [was] improper, as edited, when appropriate editing could be done by the District Attorney to exclude inadmissible evidence . . . ." Appellant's Brief ¶ 8. Although finding no objection by petitioner's counsel at trial, the Georgia Supreme Court apparently considered the point but found "no abuse of discretion on the part of the trial court in admitting the transcripts." 247 Ga. at ____, 274 S.E.2d at 322.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER DEFENDANT WAS DENIED DUE PROCESS BY A CONVICTION ON INSUFFICIENT EVIDENCE

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 309 (1979). In this case, petitioner Gary X. Nelson's right to due process was violated because he was convicted of murder, rape, and aggravated sodomy based on an

evidentiary showing that simply does not meet the reasonable doubt standard. First, when the evidence is viewed as a whole in the light most favorable to the prosecution, no rational trier of fact could have concluded beyond a reasonable doubt that petitioner was guilty as charged. Second, as to one specific element of proof required by the Georgia circumstantial evidence statute, Ga. Code Ann. § 38-109, as authoritatively construed by the Georgia Supreme Court in this case, the evidentiary showing at trial was clearly deficient and the convictions must be reversed.

A. No Rational Trier Of Fact Could Have Found Proof Of The Essential Elements Of Each Crime Beyond A Reasonable Doubt

In In re Winship, 397 U.S. 358, 364 (1970), this Court held that the Due Process Clause of the Fourteenth Amendment protects a defendant in a state criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Jackson reaffirmed Winship and held that in reviewing whether this standard has been met, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (original emphasis).

The Court should review the instant case because the proof at trial was so weak as to petitioner's guilt that it falls far short of the Winship and Jackson standards. The record here, when read in the light most favorable to the prosecution, inexorably contradicts the notion that any rational factfinder

could have found petitioner guilty beyond a reasonable doubt of murder, rape, or oral sodomy under Georgia law.

The record reveals no direct evidence and merely a few pieces of circumstantial evidence connecting petitioner with any of the crimes for which he was convicted. Two of the items of circumstantial evidence are tenuous bits of physical evidence. First, petitioner's blood type is O, and analysis showed that dried semen scraped off the victim's coat was that of a man with type O blood. TT 363-64. However, the State's own case revealed that 44 percent of the population also has type O blood.* TT 369. Although it might have been possible to analyze the sample further to establish a more precise identification, no such test was performed in the State's crime lab. Rather, the police held the sample for months before analyzing it; by then, only the fact that it was type O could be determined. TT 370-76. In addition, the only semen that was typed was a dried sample removed from the victim's coat. Although the State's pathologist testified that semen was present in the victim's vaginal and anal cavities, none was removed, typed, or tested in any way. TT 376-77.**

Second, a hair found in the victim's vagina had "sufficient similarities in coloration and microscopic properties to indicate" that it "could have come from" and was "similar" to the hair from petitioner's forearm. TT 340, 342. However, the

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* While no evidence was submitted as to the blood type of defendant's former roommate, Al Swinton, colloquy between counsel and the court revealed that he, too, had type O blood. TT 268-69.

** This is but one example of the careless police work that permeates this entire case. See pp. 21, 22-3, 66-82 infra.

State's expert on identification of hair samples admitted that hair analysis is imprecise and that the hair in question could have come from at least 120 other persons in the surrounding county alone. TT 342-43.* Moreover, there was no evidence

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* The cross-examination of the State's expert on hair analysis, Roger Parian, included the following exchange:

> Q. Could have been the same hairs that were found in the vaginal scrapings of the deceased child, Valerie Armstrong, or from the same portion of the body of that person.
> A. The hair that was brought in by Mike Hogan was identified as coming from a vaginal area of a Valerie Armstrong. That hair could have come from the forearm of Gary Nelson. It's similar.
> Q. Can you fix a percentage of possibility or probability, beyond general language, could have been or might have been, possibly could have been - I don't want to engage in semantics, but you understand my point.
> A. Yes, sir. It is very difficult to assign a number of probability to the hair comparison process.
> Q. It's not like seriographic [sic] comparisons, where we have a known percentile of the population as to certain blood types; it's not that type of thing.
> A. No, sir; it has not been classified into a population distribution.
> Q. Right. We all don't go around giving hair samples.
> A. Not yet.
> Q. Maybe someday. Mr. Parian, the possibilities, then, you really couldn't assess. It could be plus or minus fifty percent.
> A. It could be, yes, sir. I don't think so, but it could be.
> Q. Okay, either way; right, sir?
> A. It could be more than one individual, I would say that.
> Q. It could be how many individuals? Can you give me a figure? We have 120,000 people who - approximately - who live in this general metropolitan area known as the City of Savannah, of which forty percent, approximately - approximately forty percent is black, I think that's the current population ratio, and of that forty percent, or 45,000, how many of the black people in this county could have been, or in the city limits of the City of Savannah could that have been?

(Footnote continues)

-- the statement of the Georgia Supreme Court to the contrary notwithstanding -- as to whether the recovered hair was consistent with the hair of defendant's former roommate, Alphonso Swinton. The prosecution stated it would prove that the hair sample found on the victim was inconsistent with Mr. Swinton's hair and it marked for identification a hair sample stated to be Mr. Swinton's, but no evidence was ever offered as to whether that sample was consistent with the hair found on the victim. TT 332-33.

The remaining items of circumstantial evidence connecting petitioner with any of the crimes are contradictory testimonial evidence given by a little girl, Sabrina Williams, and by Al Swinton's girlfriend, Patricia Brown. Sabrina Williams, 10 years old at trial and 8 years old when the crime occurred, was a playmate of the victim's. TT 299. According to the State, Sabrina was the last person to have seen the victim alive. TT 172. When the victim's sister came searching for her at Sabrina's grandmother's house on the night she disappeared, Sabrina did not tell the sister that she had been with the victim that day. TT 310.

(Footnote continued)

Can you give me a breakdown, an off-the-wall figure?
A. Off-the-wall? Yes; it wouldn't be very accurate, though.
Q. Okay, how many?
A. Out of 60,000 Negroid population?
Q. Let's say out of Chatham County.
A. I would say approximately 120, at least.
Q. At least.
A. Yes, sir.
Q. Minimum, and the . . . . . and computations could run even higher, could they not?
A. Oh, yes, sir.

TT 341-43.

However, at the pretrial hearing and at trial, Sabrina testified that she had been with the victim on the day she disappeared. Consistent with her pretrial hearing testimony, Sabrina stated at trial that she and the victim had gone to the store together but that while she had money to buy candy, Valerie did not. TT 303. On their way back from the store, the victim left her in order to go to her "uncle's" house to get some money. TT 319. Sabrina last saw Valerie Armstrong sometime around dusk walking towards what Sabrina referred to as "Al's" house. TT 304. At trial, Sabrina deviated from her pretrial hearing testimony -- in which she had stated that she saw no one in the back yard of Al's house -- and testified that there had been a man dressed in black clothes working on one of three Volkswagens in the yard. TT 305. Although she had selected petitioner's picture from a photo array a few days after the crime as depicting the man in the yard, at trial Sabrina definitively stated that petitioner was not the man in the yard. She reiterated no less than four times that she "wasn't sure" of her previous photographic identification, explaining that she had been "scared" and "nervous" when it was made. TT 311-14, 317-24.

Another prosecution witness, the victim's brother Michael, testified that at about dusk on the day his sister disappeared he took an electric cord and light to the petitioner's home but that petitioner was not there and one of his cars was missing. The boy then returned home where his sister, the victim, was still alive and playing in the yard. TT 221-27.

The testimony of Patricia Brown, who for over ten years had been the girlfriend of petitioner's roommate, Al Swinton, related to the knife. The police separately found a taped handle

and a knife blade some 15-17 feet from the body of the victim, which they pieced together to form a complete knife. TT 246-48, 263. While laboratory analysis revealed human blood on the knife, the traces could not be typed. TT 362. Other than the presence of the unknown blood, there was no evidence that the knife was in fact the murder weapon, nor even that the size and shape of the blade was consistent with the stab wounds on the victim's body.

The prosecution, however, sought to establish that the knife belonged to the defendant. Patricia Brown could not remember the month or even the year she had last seen Al Swinton, the man whose girlfriend she admitted to being for 11 or 12 years. TT 354-55. But, looking only at a photograph of the knife more than two years after the crime and more than two years since she had been at Al's house, she testified that it was the same knife that was present in the house before Al moved out and that while the knife was not sharp, she had used it occasionally to cut chicken. TT 347-49. Ms. Brown further testified that she had gone to the house about a week before the crime. At that time, Al was not there. She did not notice whether the knife was still there. TT 350. On cross-examination, she explained that she recognized the knife because of the taped handle and that nothing else distinguished it. TT 351-52. She also testified on cross that Al Swinton's nickname was Chicken and that petitioner had been upset with Swinton because he left candy around, thus encouraging the neighborhood children to come over to the house. TT 353-54.

With respect to the knife, petitioner's girlfriend, Diane Knight, and her brother -- both originally subpoenaed

by the State -- testified for the defense that the knife was not familiar to them.* TT 526-28, 531, 549, 552-57. And, during the State's case, the police admitted that while masking tape had been found during an illegal search of defendant's house, it did not match the tape on the knife handle. TT 383. It was also revealed that in taking the tape off the knife handle, the police might have destroyed any fingerprint evidence otherwise recoverable from the tape.** TT 264-66.

Not only was the prosecution's evidence tenuous, but in examining what the prosecution did show, there are numerous

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* Both had made unsworn pretrial statements to the police. While Ms. Knight's statement was in conflict with her trial testimony, she swore that the earlier statement, elicited while she was in custody, was false. TT 542-43.

** The only other evidence conceivably connecting petitioner with either the victim or the crime came from the victim's stepfather, Rayfield McCray. Mr. McCray testified that on the day of his daughter's disappearance, while petitioner was at his home and his children were playing in the yard, he pointed out the victim to the petitioner, stating, "That's my little girl right here." He testified that petitioner responded, "Yeah, I know, that's my little buddy, because she comes down to the house all the time to go to the store for us." TT 184. Mr. McCray also testified that before the body was discovered petitioner stopped by to express his regrets that the child was missing. TT 187. Petitioner admitted to being at Mr. McCray's home on the day of the disappearance, denied discussing the child that day, denied stopping by the next day, and testified that he did not know the child by name. TT 566, 579-80.

McCray also testified that at 2 a.m. on Tuesday, February 21, the day after discovery of the body, he received an anonymous phone call from a person whom he identified as petitioner, telling him "a fellow on the east side by the name of Blue" killed his daughter. TT 188-89. While petitioner was not questioned about the phone call, the statement he gave to the police reveals that he did not have a phone in his home. TT 452. The police testified that they had identified "Blue" but did not arrest him for the crime. TT 391-92. No evidence submitted at trial showed "Blue's" whereabouts at the time of the crime or his involvement, if any, with the murder.

omissions and questions unanswerable from the record. The victim was last seen walking towards "Al's" house, but there was not a shred of evidence as to what transpired between that moment and the discovery of the body a day later. There was absolutely no evidence as to when the crime was committed during the many hours the victim was missing. There was absolutely no evidence of actual contact between petitioner and the victim at or about the time the crime was committed. Indeed, the State's own case showed that immediately before the victim disappeared petitioner was absent from the area. Nor was there a shred of evidence that petitioner was present at the scene of the crime at any time, let alone prior to or immediately following the time of death. And, there was no evidence as to Mr. Swinton's whereabouts on the day of the crime, or Mr. Swinton's hair type, despite the fact that Mr. Swinton was apparently the "Uncle" to whom the victim referred when she was last seen by her playmate, Sabrina.

Similarly, even if the knife the police pieced together was petitioner's, other than the presence of the untyped human blood on the knife there is no evidence that the knife was the the murder weapon. The State offered no proof that the knife blade was physically consistent with the stab wounds, or, a fortiori, that petitioner used that knife on the victim. There were no fingerprints on the knife linking it to the petitioner. Thus, aside from the semen and hair samples, both of which were so common as to be virtually worthless as evidence, there was no physical evidence linking the petitioner to either the victim or the crime scene. Petitioner voluntarily gave hair and blood

samples and submitted to a lengthy verbal interrogation by the police. Although the police used what may charitably be described as questionable techniques in interrogating Petitioner, no incriminating admission was made. TT 413-504.*

Other material omissions abound. There was absolutely no evidence as to any possible motive petitioner might have had for the killing. In fact, the State's own case showed petitioner on friendly terms with both the victim and her family. TT 179-90. There was absolutely no evidence that the murderer was in fact one and the same person as the rapist and sodomist. Finally, there was no evidence that the murder was committed in connection with an aggravated battery or other serious physical abuse or torture prior to death. Specifically, there was absolutely no evidence of when the murder took place or whether the murder preceded or followed the rape and sodomy. While there was testimony that one particular knife wound caused the victim to bleed to death "not long " after its infliction, there was no evidence whether the victim was conscious or unconscious during that time. Although the Georgia Supreme Court stated there were multiple stab wounds, 247 Ga. at ___, 274 S.E.2d at 323, the evidence in fact shows there was but one deep stab wound and several surface wounds. TT 293, 295.

In sum, viewing the evidence regarding the murder in the light most favorable to the prosecution, the State placed petitioner near the victim while she was alive, but wholly failed to prove the time of her death or petitioner's whereabouts at

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* Petitioner's house had also been ripped apart in an admittedly unlawful search shortly after the crime, but no incriminating evidence was uncovered. TT 168-69, 512-13.

that time. It placed near the body a knife with traces of human blood of unknown type, which had been seen in petitioner's home when both he and Mr. Swinton lived there, but failed to prove that the knife was in the house on February 19 or, in fact, that it was used in this crime. The State advanced no motive, and failed in any way to rule out a second suspect of seemingly equal probability as petitioner -- Mr. Swinton. On this basis, petitioner was found guilty of murder and ultimately sentenced to death.

In regard to the charges of rape and aggravated sodomy, the evidence most favorable to the prosecution was even more meager. The State showed that petitioner was near the victim at some time before she disappeared. The only other evidence introduced by the State connecting petitioner to the rape and sodomy was that the semen recovered from the victim's coat belonged to a person with type O blood -- a group that included petitioner, Mr. Swinton, and 44 percent of the U.S. population -- and that a hair in the child's body belonged to a member of a group comprised of, at minimum, 120 persons in that county alone. Moreover, the medical evidence showed rape and anal sodomy. TT 292-93. The pathologist specifically testified that he "couldn't swear" that there was oral sodomy and in fact stated that there is "some doubt that there was oral intercourse." TT 294-97. No other evidence in regard to oral sodomy exists on the record. Nonetheless, the trial court read to the jury the aggravated sodomy indictment which charged only oral, not anal, sodomy.* TT 655. Incredibly, the jury found petitioner guilty of oral sodomy beyond a reasonable doubt and the Georgia Supreme Court affirmed.

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* The indictment charged that Gary Nelson did "unlawfully perform a sexual act involving the penis of the said defendant and the mouth of Valerie L. Armstrong . . . with force and against the will of Valerie L. Armstrong." TT 655.

We submit that the evidence is so weak as to mandate the conclusion that no rational trier of fact could have found that there was proof of any of the charged crimes beyond a reasonable doubt.

B. The Evidence Presented At Trial Was Such That No Rational Trier Of Fact Could Have Found That The Requirement Of The Georgia Circumstantial Evidence Statute Was Satisfied Beyond A Reasonable Doubt

As set forth above, we believe that the evidence as a whole is such that it should be reviewed by this Court as to its constitutional sufficiency. Assuming, arguendo, that the evidence otherwise would pass constitutional muster, a review of the record below reveals that one essential element required to convict petitioner of the crimes charged under Georgia law simply was not established by the State. Because, as the State conceded (TT 175-76, 651-52), this was a totally circumstantial case, Georgia law required that the State's proof rule out every reasonable hypothesis consistent with innocence, Ga. Code Ann. § 38-109, and the jury was so charged. TT 662-63. The Georgia Supreme Court held that the Georgia circumstantial evidence statute, as applied to the facts adduced at trial, required the State to introduce evidence excluding the possible guilt of Alphonso Swinton, petitioner's roommate. That court also found that the State had discharged that burden. 247 Ga. at ___, 274 S.E.2d at 323.

The Georgia Supreme Court's decision, however, misstates what was proven at trial regarding Mr. Swinton. When the record is reviewed as to Mr. Swinton it is apparent that no rational trier of fact could have ruled out his guilt as a hypothesis at

least as reasonable as that of petitioner's guilt. On this limited basis alone, the evidence was constitutionally insufficient to convict Mr. Nelson.

Section 38-109 of the Georgia Code provides:

> To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

Pursuant to the statute, the jury was instructed by the trial judge that the "circumstances proven must not only be consistent with the guilt of the Accused, but they must exclude every other reasonable hypothesis . . . except that of guilt of the Accused." TT 663.* Thus, exclusion of every reasonable hypothesis save that of guilt was one of the necessary elements which the jury was required to find in order properly to convict.** Under Winship, 397 U.S. at 364, this necessary element of the charged crimes had to be proven beyond a reasonable doubt.

The Georgia Supreme Court, in reviewing the evidence and authoritatively interpreting Georgia Code section 38-109 as applied to this record, so held:

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* In the Report of the Trial Judge (required under Ga. Code Ann. § 27-2537(a)) at 4, the trial judge stated that he "cannot say that the verdict foreclosed all doubt respecting [petitioner's] guilt. However, . . . it is my opinion that the jury was well authorized to reach the conclusion that [Mr. Nelson] was guilty . . . ."

** Indeed, where, as here, the case is close or doubtful and the evidence relied on to convict is wholly circumstantantial, failure to charge on this section of the Georgia Code would have been reversible error under Georgia law, even if there had been no request for such a charge. E.g., Germany v. State, 235 Ga. 836, 221 S.E.2d 817 (1976); Sanders v. State, 97 Ga. App. 158, 102 S.E.2d 635 (1958); McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957).

> Swinton was the appellant's roommate. In order for the state to prove its case against the appellant, it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder.

247 Ga. at ___, 274 S.E.2d at 323.* The court correctly held that the State had to exclude the possibility of Mr. Swinton's guilt in order to prove its case. No rational trier of fact confronted with this record could have ruled out every hypothesis consistent with innocence without ruling out Mr. Swinton.

However, the Georgia Supreme Court seriously misread the trial record as to a crucial fact, asserting that "[t]he evidence introduced included proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm." 247 Ga. at ___, 274 S.E.2d at 323. This observation is contrary to the record. At trial, the prosecutor stated, outside the jury's presence, that he would prove that the hair found on the victim could not have come from Mr. Swinton (TT 269), and marked for identification a hair sample said -- but not proven -- to have come from Mr. Swinton's arm. TT 333. But, despite the prosecutor's statement as to what he "would" prove, the State's expert gave no testimony concerning his examination of the Swinton sample or how it compared with the sample found on the victim. Thus, no evidence whatsoever was offered as to whether the hair found on the victim was consistent with Mr. Swinton's hair. And the Georgia Supreme Court, relying on a wholly erroneous factual premise -- that the State

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* The court's opinion refers to the knife as the "murder weapon" although there is no evidence to support that characterization. See pp. 7, 22, supra.

had proven that the hair found on the victim could not have come from Swinton -- improperly concluded that "the evidence excludes every reasonable hypothesis save that of guilt." 247 Ga. at ___, 274 S.E. 2d at 323.

Petitioner cannot be sent to his death in the face of this glaring oversight. The prosecution did not exclude the possibility of Mr. Swinton's guilt. Accordingly, the State failed to prove its case against petitioner under Georgia law, as authoritatively interpreted by the Georgia Supreme Court in this very case. Winship and Jackson compel reversal of his conviction, if not on the record as a whole, certainly on the narrower basis that, as to the exclusion of Swinton, the Georgia Supreme Court relied on testimony that did not exist in the record. Cf. Thompson v. Louisville., 362 U.S. 199, 206 (1960) (due process violated by a criminal conviction based on "no evidence"). As demonstrated by the Georgia Supreme Court's misreading of the record, the lack of evidence in this case introduced "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Beck v. Alabama, 100 S. Ct. 2382, 2392 (1980).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GEORGIA'S STATUTORY BASIS FOR IMPOSING DEATH HERE IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD ON ITS FACE OR AS APPLIED IN THIS CASE

The only statutory aggravating circumstance supporting the death penalty imposed in this case is section (b)(7), which permits a capital sentence if the jury finds unanimously and beyond a reasonable doubt that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it

involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534(b)(7). This Court has long been concerned about the apparent vagueness and overbreadth of section (b)(7). We submit that experience in the application and construction of section (b)(7) now requires a holding that it is unconstitutional on its face. In the alternative, as we show in Part B, infra, section (b)(7) was applied unconstitutionally in this case.

A. Section (b)(7) Is Unconstitutional On Its Face

Well before this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), studies of jury behavior strongly suggested that arbitrary and capricious sentencing results were likely in any effort to compare "heinous" murders. In their influential work on juries published in 1966, Kalven and Zeisel studied 111 pre-Furman cases in "which either judge or jury found the defendant guilty of a capital crime and hence could have given the death penalty." H. Kalven & H. Zeisel, The American Jury (hereafter cited as "Kalven and Zeisel") 435-36 (Phoenix ed. 1971) (original emphasis; footnote omitted). After noting that imposition of the death penalty was itself relatively rare (juries imposed it in only 19 percent and judges in only 26 percent of these cases), Kalven and Zeisel also concluded that the "cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness." Id. at 437. However, Kalven and Zeisel also found that there was a randomness to classifying crimes on this basis: "[M]any of the murder cases in which the judge and jury disagree on the death penalty [-- 21 in this study --] appear no less heinous than those in which they agree." Id. at 439.

When Georgia re-enacted the death penalty after Furman, the legislature obviously attempted to preserve the capital jury's right to make judgments based on "heinous" circumstances. Section (b)(7) was the result, and this case poses the issue of whether specifying heinousness as a statutory aggravating circumstance truly guides or channels jury discretion so as to avoid "freakish" imposition of the ultimate sanction. We submit that it does not, at least absent: (1) a legislative effort that is considerably more detailed and specific than that exemplified in the unelaborated words of section (b)(7), and (2) a requirement that such detailed standards be invariably explained to capital juries in a consistent manner through trial court instructions. Both of these requirements are absent in the present case and, indeed, they are absent in most (if not all) Georgia capital cases where the death sentence is based solely on section (b)(7). Unless these criteria are met, and they were not met below, a sample of "heinous" murders in which the death penalty is sought solely on the basis of section (b)(7) will, on a random basis, sometimes produce a death sentence and other times life imprisonment.

This perception has long troubled this Court. Gregg v. Georgia, 428 U.S. 153 (1976), rejected a broad challenge to Georgia's post-Furman capital punishment statute. The two principal opinions noted that the new sentencing procedures "channeled" the jury's sentencing discretion, 428 U.S. at 206 (plurality opinion), and that this legislative "effort to guide the jury in the exercise of its discretion" was not vulnerable to "the naked assertion that the effort is bound to fail," id. at 222 (White, J., concurring). Focusing specifically on the special role of the Georgia Supreme Court in reviewing all death sentences

"to ensure that the sentence of death in a particular case is not disproportionate," the plurality also concluded that that court's role was "an important additional safeguard against arbitrariness and caprice" which, combined with the other procedures, "[o]n their faces . . . seem to satisfy the concerns of Furman." Id. at 198.*

The plurality also responded to a specific claim that section (b)(7) was unconstitutionally vague and overbroad:

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, see McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture-murder.

428 U.S. at 201 (footnotes omitted).**

In the years since Gregg, however, the Supreme Court of Georgia has adopted an open-ended construction of section (b)(7). The clearest evidence of this is in the Georgia Supreme

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* Justice White's opinion concurring in the judgment in Gregg also stressed the special staff and procedures attending mandatory appellate review, 428 U.S. at 223, concluding that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside." Id. at 224. On the facts of this case, see pp. 27-28 supra, one cannot escape the conclusion that appellate review of the trial record was something less than meticulous.

** In Gregg itself, § (b)(7) was one of three aggravating circumstances submitted to the jury on the sentencing phase, and the jury failed to find that aggravating circumstance although the evidence indicated that the murders were brutal, execution-style killings. See 428 U.S. at 159-60.

Court's reaction to Gregg and to this Court's ruling last term in Godfrey v. Georgia, 446 U.S. 420 (1980). Furthermore, the number of cases in which section (b)(7) is the sole support for a sentence of death has expanded significantly, indicating that prosecutors, juries and the Georgia courts are increasingly using section (b)(7) -- by far the most general of the statutory aggravating circumstances -- as a catch-all provision to justify imposition of the death penalty on an essentially random basis.

The central problem posed by section (b)(7) is that it requires the jury to make an unguided, comparative judgment rather than to find facts. With one possible exception,* none of the other aggravating circumstances in the Georgia death penalty statute (Ga. Code Ann. §§ 27-2534.1 (b)(1)-(10)) requires the jury to do anything other than to determine whether the prosecution has proved specific, objective facts.** Thus, section (b)(7) -- particularly when it is the only aggravating circumstance relied upon by the State -- poses wholly unique problems under the Georgia capital punishment scheme. In effect, it requires the jury to determine that the murder was so especially heinous as

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* The exception consists of a clause in the first aggravating circumstances permitting imposition of the death penalty if the jury finds that a "murder was committed by a person who has a substantial history of serious assaultive criminal convictions." Ga. Code Ann. § 27-2534.1(b)(1). That clause, although seemingly more precise than § (b)(7), was struck down on grounds of vagueness by the Georgia Supreme Court. Arnold v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976). See Gregg, 428 U.S. at 202.

** For example, a jury may be called upon to decide whether the murder was for hire (the sixth aggravating circumstance) or whether the victim was a policeman, fireman or prison employee engaged in performing his or her duties (the eighth aggravating circumstance).

to warrant the ultimate sanction. To avoid arbitrariness, a jury making such a finding must necessarily compare, in a carefully channeled way, degrees of heinousness. The jury might do this in several ways. For example, it might be apprised about all the murders that have occurred in Georgia, and whether the offenders were sentenced to life or death, so that it could weigh the evidence presented to it against those other murders. However, the Georgia trial courts have not, to our knowledge, sought to instruct juries about the facts of other heinous murders.* Alternatively, the jury might make such a finding guided by some objective standard in such a way as to avoid arbitrariness. Although it is apparently this second course that the Georgia legislature intended in drafting section (b)(7), the trial courts have wholly failed to narrow or to explain such objective standards in their jury charges. Rather, they routinely rely simply upon a reading of the statute without elaboration.**

The constitutional infirmities of the statute as it is worded and applied in Georgia -- particularly in light of the

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* Indeed, it would apparently be error in Georgia for the prosecutor to comment on the facts of other cases. See Ga. Code Ann. § 24-3319:

> Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals.

Accord, Hawes v. State, 240 Ga. 327, 336, 240 S.E.2d 833, 840 (1977).

** See, e.g., Godfrey v. Georgia, 446 U.S. 420, 426 (plurality opinion); id. at 440-41 (Marshall, J., concurring in the judgment). At the sentencing phase of petitioner's trial, the trial court quoted § (b)(7) without any limiting instruction, except as to the statutory definition of aggravated battery. TT 677.

Eighth Amendment concerns expressed in Furman -- are: (1) that the jury is expressly required to make a comparative choice, and (2) that the guidance provided by the unexplained statutory language of section (b)(7) is an insufficient basis upon which to make such a choice.

Review of all capital cases by the Georgia Supreme Court has not corrected these deficiencies.* That court continues to permit juries in capital cases to determine whether their case is somehow "outrageously or wantonly vile, horrible or inhuman" as compared to other murders, based apparently, not on evidence of record, but simply on the jurors' general knowledge, colored by the arguments of counsel.** This is hardly conventional fact-finding, although the Georgia statute expressly requires that each element of the section (b)(7) aggravating circumstance must be found "beyond a reasonable doubt." Moreover, in its review, the Georgia Supreme Court, rather than following a restrictive view of the second clause of section (b)(7), has adopted extremely loose definitions of each term contained in that clause, and has not hesitated to expand even those definitions on an ad hoc basis

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* See Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 159 (1979).

** For example, in the present case, while exhibiting to the jury inflammatory photographs depicting the condition of the victim's body, the prosecutor stated:

> I'm going to let you see right now . . . how that little girl lay on the table at the Morgue. You know, what kind of person does that? What kind of a person takes a six-year old baby and does that to her? Or would you even classify that as a person? Is that a person? Was that a human being that's supposed to be made in the image and likeness of God who could do that?

TT 673.

in order to uphold death penalties imposed in later cases. Nor has the Georgia Supreme Court required that even such definitions as it has offered from time to time be included in jury charges. Thus, the most that can be said of a determination under section (b)(7) is that each juror, somehow, must form the opinion that the crime established by the state was especially heinous.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court was compelled to intervene. Confining itself to the situation presented, the plurality opinion clearly established that any death sentence resting solely upon a jury finding that defendant's offense was "outrageously or wantonly vile, horrible and inhuman" was constitutionally infirm under the Eighth and Fourteenth Amendments:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions [which quoted the statutory language of § (b)(7) in its entirety]. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

446 U.S. at 428-29 (bracketed material from id. at 426).

Godfrey also considered extensively the impact of the second, "limiting" clause contained in section (b)(7). The plurality opinion observed that two post-Gregg Georgia decisions interpreting section (b)(7), Harris v. State, 237 Ga. 718, 230 S.E.2d 1, 10-11 (1976), cert. denied, 431 U.S. 933 (1977) and Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643, cert. denied, 434 U.S. 960 (1977),

> suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from Blake alone, was that the word, "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

446 U.S. at 431 (emphasis added; footnote omitted). The plurality went on to stress the lack of any evidence of torture or aggravated battery to Godfrey's two victims, and the fact that both were killed "instantaneously." Id. at 432-33.*

The plain meaning of the passage quoted above is that any constitutional "core" subsisting within the language of section (b)(7) is extremely limited in scope: i.e., this aggravating circumstance could be constitutionally applied only if the evidence of record establishes beyond a reasonable doubt the objective fact that the victim suffered serious physical abuse prior to death. The Godfrey plurality's second observation quoted above is particularly significant in light of subsequent interpretations of section (b)(7) by the Supreme Court of Georgia (see pp. 37-46, infra), because it requires an extremely limited construction of the phrase "depravity of mind." In effect, we submit, Godfrey held that, in order for section (b)(7) to be constitutional, the "depravity" phrase -- which is exceedingly

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* There was a vigorous dissent by Mr. Justice White contesting, inter alia, the plurality's interpretation of the evidence, particularly as regards Mr. Godfrey's second victim, his mother-in-law. See 446 U.S. at 449-51 (White, J. dissenting).

broad and vague -- must be stripped of independent significance by always being clearly linked in jury instructions to the considerably more specific requirement that the evidence demonstrate "torture" or "aggravated battery." This was hardly surprising, since the plurality opinion in Gregg had singled out the "depravity" language by observing that it was, "of course, arguable that any murder involves depravity of mind." 428 U.S. at 201.*

Thus, it seemed clear after Godfrey how section (b)(7) had to be interpreted if it was to survive constitutional scrutiny. Petitioner's trial occurred in February 1980, after certiorari had been granted in Godfrey, 444 U.S. 897 (October 9, 1979), and prior to this Court's Godfrey decision in May 1980. He unsuccessfully raised the question of the constitutional validity of his sentence in light of Godfrey in both courts below. The Georgia Supreme Court's response, stated in its sentence review, was that:

> [f]rom the evidence [concerning the condition of the victim's body], the jury was fully authorized in finding that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." See generally Hance v. State, 245 Ga. 856, 268 S.E.2d 339 supra. The verdict is factually substantiated.

Nelson, 247 Ga. at ___, 274 S.E.2d at 323 (January 27, 1981).

We are thus directed to Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980),** to determine whether the Georgia Supreme Court has complied with Godfrey. At the outset, we state our

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* See also Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

** This Court denied certiorari following the cited decision of the Georgia Supreme Court in Hance. Hance v. Georgia, 101 S. Ct. 796 (1980). The petition filed in this Court, however, did not attack the constitutionality of § (b)(7). See Petition for Certiorari filed in Hance v. Georgia, No. 80-5561, on October 19, 1980.

conclusion: Hance demonstrates that the Supreme Court of Georgia has not yet adopted a constitutionally permissible construction of section (b)(7), despite the passage of five years and the issuance of two opinions of this Court requiring such a response. Because "death is different,"* and because this Court itself is without authority to construe definitively section (b)(7) in a constitutional manner,** this Court must now intervene and declare that portion of the statute unconstitutionally vague and overbroad on its face in order to prevent the arbitrary and capricious imposition of the death penalty condemned in Furman.

The Hance opinion of June 24, 1980, contains the Georgia Supreme Court's most extensive interpretation of section (b)(7) since the statute was amended in 1973 in the wake of Furman. Directly responding to Hance's claim of unconstitutional overbreadth and vagueness in light of Godfrey, the state court held that:

> In order for [section (b)(7)] to be constitutionally applied in a given case, we hold that the evidence presented at trial must satisfy the following criteria as they apply to the specific factual situation of each case.
>
> * * *
>
> [¶ 1]
>
> This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it

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* Gregg, 428 U.S. at 188 (plurality opinion); accord, Beck v. Alabama 447 U.S. 625, 637-38 (1980); Gardner v. Florida 430 U.S. 349, 357-58 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

** Smith v. Goguen, 415 U.S. 566, 575 (1974); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).

involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining "[w]hether . . . the evidence supports the jury's or judge's finding of [this] statutory aggravating circumstance . . ." (Code Ann. § 27-2537(c)(2)), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth. . . .

[¶ 2]

The phrases "outrageously or wantonly vile, horrible or inhuman" are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Godfrey v. Georgia, [446 U.S. 420 (1980)].

[¶ 3]

Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained.

[¶ 4]

An aggravated battery occurs when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Code Ann. § 26-1305. In order to constitute aggravated battery, the bodily harm to the victim must occur before death. Godfrey v. Georgia, supra.

[¶ 5]

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, [supra]. Serious sexual abuse may be found to constitute serious physical abuse. House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974). Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined.

[¶ 6]

Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

[¶ 7]

Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery (Godfrey v. Georgia, [supra]. . .; i.e., only facts showing aggravated battery or torture (as hereinabove defined), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind. (Godfrey v. Georgia, supra.)

[¶ 8]

Where only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i.e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

[¶ 9]

In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. See Thomas v. State, 245 Ga. 688 [266 S.E.2d 499] (1980).

[¶ 10]

A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code § 26-1305, supra [the aggravated battery statute]), or who commits a sex act upon the victim's body after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute.

[¶ 11]

> Where it cannot be determined whether the victim was subject to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death.

Hance, 245 Ga. at 860-62, 268 S.E.2d at 345-46.

To our knowledge, such an instruction has never been given to a Georgia jury charged with determining whether section (b)(7) is satisfied. See Godfrey, 446 U.S. at 436-37, 440-42 (Marshall, J., concurring in judgment).* Certainly no such charge was given in petitioner's case. See TT 676-80, discussed at pp. 8-11 supra. However, even this extensive interpretation of section (b)(7) is constitutionally deficient under Godfrey in at least four major respects.

First, the Georgia court continues to maintain that the jury must, and constitutionally may, make the inherently comparative judgment that the murder before it is "outrageously or wantonly vile, horrible or inhuman." Hance, ¶¶ 1, 2 and 3,

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* As this Court is aware, the Georgia Supreme Court holds the view that it is unnecessary for it to vacate death sentences imposed in whole or in part under § (b)(7) so as to require a new sentencing trial. Rather, that court itself purports to review the evidence presented and attempts to determine whether that evidence establishes the existence of one or more of the aggravating circumstances originally found by the jury. See Westbrook v. Balkcom, 49 U.S.L.W. 3371 (1980)(Stevens, J., concurring in the denial of certiorari). See also Brooks v. State, 246 Ga. 262, 271 S.E. 2d 172 (1980). This Court, however, has yet to rule definitively on the propriety of this procedure. Cf. Willis v. Balkcom, 49 U.S.L.W. 3786 (1981) (Marshall, Brennan and Stewart, JJ., dissenting from the denial of certiorari).

quoted supra. It may be, as the Georgia court observed, that phrases such as "outrageously or wantonly vile" employ words of "common understanding," but that begs the question. It is their application across a universe of murders -- to distinguish the ordinary from the extraordinary -- that is not a matter of common understanding or experience. This is why Godfrey held that a jury's finding that a particular murder was horrible or vile could not constitutionally support the imposition of the death penalty, unless there was also an evidentiary finding of serious physical abuse of the victim before death. Thus, as interpreted in Hance, the phrase "outrageously and wantonly vile, horrible or inhuman" continues to have independent significance despite the fact that its breadth and vagueness can only serve to increase arbitrary and capricious capital sentencing in violation of the basic tenets of Furman.

The second deficiency of the authoritative construction of section (b)(7) by the Georgia Supreme Court in Hance is analytically distinct from the first, but -- absent intervention by this Court -- is likely to be of greatest practical import to those accused of murder in Georgia. As we have shown, Godfrey indicates that section (b)(7) could not constitutionally be applied in a case where the jury found only that the murder was "outrageously . . . vile," etc., "in that it involved . . . depravity of mind . . . ." This conclusion follows inevitably from the fact that the plurality opinion in Godfrey required that the latter phrase be stripped of independent significance by linking it -- in each and every case -- to the somewhat more specific language concerning torture and aggravated battery. Compare Godfrey, 446 U.S. at 431 (plurality opinion), with id.

at 451 (White, J., dissenting). The Georgia Supreme Court in Hance -- in ¶¶ 1, 3, 8, 9, 10 and 11 quoted supra -- flatly refused to so hold. Since Gregg, that court has been aware of this Court's particular concern about the vagueness of the "depravity of mind" phrase in section (b)(7), yet its opinion in Hance gives this phrase immense independent significance.* This result -- which contravenes Godfrey -- cannot be permitted to stand, for Hance permits Georgia juries, performing the already unfamiliar task of exercising sentencing discretion, see Gregg, 428 U.S. at 192, to impose the ultimate punishment under a statute of such "standardless sweep" that it permits those "juries to pursue their personal predilections." Smith v. Goguen, 415 U.S. 566, 575 (1974). See also Godfrey, 446 U.S. at 427-33; Grayned v.

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* Professor Black has made a powerful case against this particular phrase in § (b)(7):

> "Depravity of mind," one of the Georgia sentencing criteria, may seem to you, as it does to me, a term so vague as to make the "standard" in which it occurs a non-standard, a pseudo-standard, a phrase having the look of a standard but possessed of no resolving power. But if another view be taken -- the view that "depravity of mind" has a real meaning in some metaphysical sphere of transcendent lexicography, so that there is drawn, in that abstract realm, a real line between "depravity" and "nondepravity" -- the position is still no better. For this precise meaning, even if assumed to exist, is not discoverable by humans. If there is a line, the light is too dim for us to see it. Mistake is therefore exceedingly likely -- indeed, quite certain -- to occur frequently. It really depends on our philosophy of language whether we say that this phrase, "depravity of mind," has no sharp meaning and so cannot decently be part of a "standard" or say that it has a "correct" meaning, so that every presented case does in fact fall on one side or the other of a line, but that this line (and this is the empiric fact, not changeable by philosophy) is impossible to locate accurately, so that mistake in judgment is certain. There is nothing to choose between these alternatives; neither will do for hanging men and women.

C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 68 (1974).

City of Rockford, 408 U.S. 104, 109 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 165-79 (1972). If a citizen may not constitutionally be fined or sentenced to jail upon conviction of an offense defined solely as "prowling by auto," Papachristou, 405 U.S. at 158, 171, how can he be sentenced to death -- as Hance would permit -- for a murder that is "outrageously . . . horrible . . . in that it involved . . . depravity of mind"?

Third, the Georgia court in Hance has itself undermined the relative precision of the terms "torture" and aggravated battery" by creating a "laundry list" of new factors which can henceforth be equated with or imported into those phrases. Thus, we are told that "psychological abuse by the defendant to the victim before death may amount to serious physical abuse (i.e., torture of the victim)," (Hance, ¶ 6 quoted supra), and that serious sexual abuse can constitute serious physical abuse. (Hance, ¶ 5, quoted supra). A plurality of this Court in Godfrey rejected at least the former contention, 446 U.S. at 428-31, and the latter statement is itself impermissibly vague because the word "serious" is not modified by any limiting statutory language. Cf. Arnold v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976).

Fourth, the Hance opinion -- far from confining the scope of the objectionable "depravity" language -- has interpreted it exceedingly broadly. Going beyond the limiting language employed in section (b)(7) itself ("torture" or "aggravated battery"), the Georgia Supreme Court explained that psychological abuse of the victim before death, mutilation or disfigurement of a victim's body after death, or the commission of a sex act upon the body after death would be sufficient to show depravity of mind (Hance,

¶¶ 6 and 10, quoted supra), and that the age and physical characteristics of the victim may be considered in assessing "depravity of mind." (Hance, ¶ 9, quoted supra). Finally, if, as is true in petitioner's case, the evidence is insufficient to establish the sequence of events, the time of death, or the cause of death, the defendant may nevertheless be executed under the Hance rationale "on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death." (Hance, ¶ 11, quoted supra).*

All of these additional factors relating to torture, depravity, and insufficient evidence about the sequence of a victim's wounds -- articulated in Hance for the first time in Georgia's jurisprudence of death -- were necessary, of course, to save one or more previously affirmed death sentences. But the fact that the Georgia Supreme Court was finally compelled by this Court to provide such a list seven years after the statute was amended is itself a direct condemnation of the administration of section (b)(7). We reiterate that such a list of factors has never to our knowledge been read to a Georgia jury deciding a capital case, either before or after the decision in Hance, and, pointedly, not in this case. The inevitable result is that the seventh aggravating circumstance has become, in practice, precisely the kind of "catch-all" provision permitting random

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* The Georgia court's effort to define further this indefinable phrase evokes Justice Black's dissent in Edelman v. California, 344 U.S. 357, 364 (1953), which observed that a state court's efforts in defining a vagrancy statute so as "to reduce ambiguity greatly increased it." And there remains the problem alluded to earlier -- i.e., that the Georgia Supreme Court is, through decisions like Hance, substituting its sentencing judgment for that of the jury, the body charged under Georgia law with determining whether the death sentence should be imposed.

imposition of the death penalty which the majority of a divided Georgia Supreme Court promised to guard against in its first post-Gregg decisions involving section (b)(7). Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1, 10 (1976). See also Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976), cert. denied, 430 U.S. 975 (1977). In the wake of Gregg, one member of the Georgia Supreme Court determined that Georgia's "discretionary system" of capital sentencing did not alleviate the concerns that this Court expressed in Furman about "wanton or freakish imposition" (408 U.S. at 310 (Stewart, J., concurring)) of the death penalty and was hence invalid under the Georgia constitution:

> I respectfully disagree with [the Gregg opinion of] Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens. My experience in reviewing cases tried under the current Georgia system convinces me that a jury's discretion is not channeled, and a Georgia jury can "at its whim" impose or not impose the death penalty in any case wherein the statutes say it can be imposed and where the statutory aggravating circumstances are found to be present and unrefuted. Furthermore, my experience also teaches me that a majority of the membership of this court can "at its whim" affirm a death penalty or set it aside as excessive and unconstitutional.

Street v. State, 237 Ga. 307, 322, 227 S.E.2d 750, 760 (Gunter, J., dissenting), vacated, 429 U.S. 995 (1976). At least as respects the administration of section (b)(7), this Court's intervention is now required to remedy such whimsical administration of the ultimate, irrevocable sanction.

Our concern is magnified because, so far as one can tell from reported cases, the use of section (b)(7) as the sole ground for seeking or imposing the death penalty has increased dramatically since that section escaped outright condemnation in Gregg. In Gregg, this Court noted that it was aware of only one case in which section (b)(7) was the sole basis for a death

sentence, 428 U.S. at 201, suggesting, of course, that the provision was rarely used.* Since Gregg, however, our study of the Georgia decisions indicates that 24 additional death sentences have been imposed or affirmed solely on the basis of section (b)(7).** Moreover, the trend seems to be accelerating: in 1973, there were no death sentences grounded only on section (b)(7); in 1974, two;*** in 1975, none; in 1976, two;**** in 1977, three;***** in 1978, three;****** in 1979, four;******* in 1980,

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* Actually, there were two such cases as of the date Gregg was decided. See p. 47 n.*** infra.

** We have not deleted from these numbers cases in which the death sentences were reversed by the Georgia Supreme Court itself, or where a death sentence initially affirmed by the Georgia Supreme Court was subsequently vacated, since our point is that this particular aggravating circumstance is being employed more and more often in trial courts in Georgia as the sole ground for seeking or imposing the death penalty.

*** House v. State, 232 Ga. 140, 205 S.E.2d 217 (April 4, 1974), cert. denied, 428 U.S. 910 (1976); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (Dec. 3, 1974), cert. denied, 428 U.S. 910 (1976). As a dissent in Banks v. State, n.**** below, makes clear, House involved only § (b)(7).

**** Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (July 13, 1976); Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (Sept. 28, 1976).

***** Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (Jan. 4, 1977), cert. denied, 445 U.S. 946 (1980); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (June 9, 1977); Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (June 28, 1977).

****** Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (March 7, 1978); Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (June 28, 1978), cert. denied, 441 U.S. 967 (1979); Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (Oct. 17, 1978).

******* Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (Feb. 6, 1979), vacated in part, 446 U.S. 961 (1980); Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (Feb. 27, 1979) rev'd, 446 U.S. 420 (1980); Holton v. State, 243 Ga. 312, 253 S.E.2d 736 (Mar. 6, 1979), cert. denied, 444 U.S. 925 (1979); Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (Oct. 3, 1979), cert. denied, 446 U.S. 970 (1980).

seven*; and, so far in 1981, five**.

Moreover, as of July 2, 1976, just after this Court decided Gregg, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") -- a frequent litigant in capital cases in this Court -- estimated that there were 37 people on death row in Georgia.*** Thus, as of that time, only about 5 percent of the death row population had been sentenced to die solely on the basis of section (b)(7). As of April 20, 1981, the LDF estimates that the total population of death row in Georgia is 95.**** Thus, the spate of death sentences resting solely on section (b)(7) since this Count sustained that section in Gregg has resulted in a situation where 26 out of the 95 -- fully 27 percent of the total death

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* Patrick v. State, 245 Ga. 417, 265 S.E.2d 553 (Jan. 24, 1980), vacated, 101 S. Ct. 522 (1980); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (Feb. 20, 1980), vacated, 101 S. Ct. 523 (1981); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (Feb. 20, 1980) supp'l op., 245 Ga. 881, 268 S.E.2d 351, cert. denied, 101 S. Ct. 407 (1980); Burger v. State, 245 Ga. 458, 265 S.E.2d 796 (Mar. 14, 1980), cert. denied, 446 U.S. 988 (1980); Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (Apr. 23, 1980), vacated, 101 S. Ct. 523 (1980); Hance v. State, 245 Ga. at 856, 268 S.E.2d at 339 (June 24, 1980); Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (Oct. 8, 1980), cert. denied, 101 S. Ct. 956 (1981).

** Nelson, 247 Ga. at ___, 274 S.E.2d at 317 (June 27, 1981); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29 (Feb. 10, 1981); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (Feb. 11, 1981); Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (Feb. 24, 1981); High v. State, 247 Ga. 289, 276 S.E.2d 5 (Feb. 24, 1981).

*** NAACP LDF Memo, "Re: Death Row Inmates" at 2 (July 2, 1976). This total number excludes capital inmates whose convictions and/or sentences have been vacated, where a State's appeal is pending, and whose sentences have been vacated where new sentencing proceedings are pending.

**** NAACP LDF Newsletter, "Death Row, U.S.A." at 1 n.*, 8 (April 20, 1981). This total excludes the inmates described in the immediately preceding footnote ** supra.

row population -- could be there solely because of that aggravating circumstance.*

Other empirical research now underway tends to confirm widespread use of the seventh aggravating circumstance in Georgia. Three of the four authors of a recent Stanford Law Review article discussing statistical bases for comparing death sentences** are currently working under a National Institute of Justice grant*** on an analysis of data taken from the court records of a sample including more than 330 murder cases tried in Georgia under the new capital punishment statute and disposed of on direct appeal by the Georgia Supreme Court on or before June 29, 1978. Their preliminary data -- as yet unpublished but furnished to us orally -- indicate that during the period covered, out of the total sample of more than 330 murder cases, 94 went to a penalty phase at which death could have been imposed. The death sentence was in fact pronounced in 60 (64 percent) of these cases and life imprisonment in 34 (36 percent). Specifically considering section (b)(7), the data show:

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* We use the word "could," because a few of the defendants among the 26 we found in the Georgia Supreme Court's opinions have subsequently secured, in one form or another, a reversal or vacation of their conviction or sentence. For example, Mr. Godfrey is included in our sample of 26, although this Court reversed his sentence. We submit that this does not undercut our point about the administration of § (b)(7), however, since in every one of the 26 cases, the Georgia Supreme Court or a Georgia jury held at some point that the sentence of death was proper based solely on § (b)(7).

** Baldus, Pulaski, Woodworth, & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980).

*** National Institute of Justice, Grant No. 80-IJ-CX-0035, "The Impact of Procedural Reform on Capital Cases in Georgia."

Georgia Murder Cases Resulting in Penalty Trials
1973 - June 1978

	60 Death Sentence		34 Life Sentence		94 Totals	
	No.	%	No.	%	No.	%
§ (b)(7) was the only aggravating circumstance charged*	10	17%	4	12%	14	15%
§ (b)(7) was charged with one or more other aggravating circumstances	23	38	9	26	32	34
Subtotal: Cases in which § (b)(7) was charged	33	55	13	38	46	49
§ (b)(7) was not charged	27	45	21	62	48	51
Total	60	100%	34	100%	94	100%

Thus, of the 94 murder trials in the sample that went to a penalty phase, section (b)(7) was charged to the jury, alone or in conjunction with other aggravating circumstances, 46 times, i.e., in fully 48 percent of the cases. In the 60 murder trials where the death penalty resulted, the jury was charged on section (b)(7), alone or in conjunction with other aggravating circumstances, 33 times, i.e., in 55 percent of the cases. And in 14 of the 94 cases in the sample, section (b)(7) was the only aggravating circumstance charged -- fully 15 percent of the penalty trials.**

We submit that increased use of section (b)(7) -- which we concede is crudely measured because of the limitations of the data available to us -- is not a coincidence, but rather a

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* Data as to each case are taken from trial judge's charge to the jury.

** These data are, of course, consistent with that which we presented at pp. 46-49 above, although, at present, they are not arranged so as to permit further verification of our point that the use of § (b)(7) has been increasing over time.

direct result of the Georgia Supreme Court's willingness to condone expanded use of this inherently vague provision. We do not dispute that vague and overbroad statutes are more convenient vehicles for prosecutors, judges, and juries to employ to the disadvantage of individuals who stand accused of crime. Rather, because of this we urge this Court to reaffirm that such statutes are constitutionally invalid precisely because they make it easier for "policemen, judges and juries" to resolve basic matters "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

B. Section (b)(7) Was Unconstitutionally Applied On The Facts Of This Case

1. The Vague and Overbroad Language of Section (b)(7) Conferred Unbridled Sentencing Discretion on the Jury, in Violation of the Eighth and Fourteenth Amendments

In Furman, this Court held that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, unless the discretion of the jury to take or spare a human life is suitably directed and limited so as to minimize the risk of arbitrary and capricious action. See Gregg, 428 U.S. at 169 n.15, 189 (plurality opinion), and 220-21 (White, J., concurring). Gregg identified the procedural safeguards that Georgia must follow to impose a constitutionally permissible death sentence. First, the jury must be given adequate sentencing information, and careful instructions on the law and how to apply it. Id. at 188-95, 197-98 (plurality opinion), and 221-22 (White, J., concurring). Second, the Georgia Supreme Court

must engage in meaningful appellate review to ensure that death sentences are not imposed in a capricious or freakish manner. Id. at 195, 198, 204-206 (plurality opinion), and 224-25 (White, J., concurring).

Specifically addressing the validity of section (b)(7), Gregg held that the section was not unconstitutional on its face, a holding premised on the assumption that the Georgia Supreme Court would give discernible content to section (b)(7) that would be read to the jury and consistently applied by the Georgia Supreme Court on appeal. 428 U.S. at 201, 202 n.54 (plurality opinion). Experience proved this assumption to be incorrect, and in Godfrey the Court held that the Georgia Supreme Court had there adopted such a broad and vague construction of section (b)(7) as to violate the Eighth and Fourteenth Amendments. After once again emphasizing the procedural safeguards that Georgia must follow before it may constitutionally impose a death sentence,* Godfrey articulated a narrow, constitutional construction of section (b)(7) to guide Georgia juries and the Georgia Supreme Court so that these safeguards would not be eroded. 446 U.S. at 431; accord, id. at 432 (plurality opinion). See pp. 35-37, supra.

The jury instructions below, couched solely in the vague and overbroad language of section (b)(7) itself, conferred unbridled sentencing discretion on the jury in violation of the Eighth and Fourteenth Amendments as construed in Furman,

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* The State must formulate clear and objective standards that (1) provide specific and detailed guidance to the jury and channel its sentencing discretion, and (2) make possible meaningful and rational appellate review of the process of imposing the death sentence. Godfrey, 446 U.S. at 428 (plurality opinion).

Gregg and Godfrey. There is nothing in the language of section (b)(7) standing alone that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. Godfrey, 446 U.S. at 428 (plurality opinion).* Thus, this case represents the standardless and unchanneled imposition of a death sentence in the uncontrolled discretion of a basically uninstructed jury, precisely the vice condemned in Furman. Godfrey, 446 U.S. at 428-29 (plurality opinion). Assuming, arguendo, that the Georgia Supreme Court's interpretation of section (b)(7) in Hance, quoted supra at pp. 38-41, complied with Godfrey, petitioner's jury was not instructed in such terms and his death sentence therefore must be reversed.

The failure to instruct the jury properly was not cured by the Georgia Supreme Court's sentence review in this case. First, the function of appellate review of capital sentences is not to determine whether the jury, if it had been properly instructed, could have permissibly imposed a death sentence. This Court's death penalty cases make clear that it is the discretion of the sentencing body which must be guided by clear, objective, and specific standards. See Beck v. Alabama, 447 U.S. 625 (1980) (death penalty statute that prevented jury instructions on lesser included offenses held unconstitutional); Godfrey, 446 U.S. at 428-29 (plurality opinion); id. at 436-37 (Marshall, J., concurring); Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam)

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* "A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman," Godfrey, 446 U.S. at 429 (plurality opinion), and arguably "any murder involves depravity of mind or an aggravated battery." Gregg, 428 U.S. at 201 (plurality opinion).

(appellate court may not affirm death sentence on the basis of a theory on which the jury was not instructed); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (death penalty statute that prevented sentencer from considering individualized mitigating circumstances held unconstitutional); Bell v. Ohio, 438 U.S. 637 (1978) (plurality opinion) (same); [Stanislaus] Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion) (mandatory death penalty statute that prevented sentencer from considering individualized aggravating and mitigating circumstances held unconstitutional); [Harry] Roberts v. Louisiana, 431 U.S. 633 (1977) (plurality opinion) (same); Woodson v. North Carolina, 428 U.S. 280, 302 (1976) (plurality opinion) (mandatory death penalty statute that "simply papered over the problem [condemned in Furman] of unguided and unchecked jury discretion" held unconstitutional); Jurek v. Texas 428 U.S. 262, 276 (1976) (plurality opinion) (in capital cases, the state must ensure that "the sentencing jury will have adequate guidance to enable it to perform its sentencing function"); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality opinion) (state must ensure that sentencing bodies are "given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life"); Gregg, 428 U.S. at 193 (plurality opinion) ("It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." "It would be virtually unthinkable to follow any other course . . . ."); Furman v. Georgia, 408 U.S. 238 (1972) (standardless capital sentencing held unconstitutional because it permits juries to impose death penalty in a discriminatory (id. at 256-57 (Douglas, J., concurring)), wanton and freakish (id. at 310 (Stewart J., concurring)), and infrequent (id. at 313 (White, J., concurring)) manner).

The proper function of appellate review of capital sentences in Georgia is much more circumscribed: If and only if a properly instructed jury imposes a death sentence on the basis of sufficient information and duly admitted evidence in a procedurally adequate sentence hearing, then the Georgia Supreme Court must review the sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether it is supported by the evidence; and whether it is excessive or disproportionate to the penalty imposed in similar cases. Ga. Code Ann. §§ 27-2537(c)(1)-(3).

The second reason that appellate review did not cure the sentencing errors is that the Georgia Supreme Court failed to perform its task properly in this case. Despite the increased need for reliability at both the guilt and sentence phases of a capital trial, Beck v. Alabama, 447 U.S. 625, 638 (1980), the Georgia Supreme Court misread the evidence of record concerning Swinton's hair, see pp. 27-28 supra, the sequence of events surrounding the victim's death, see pp. 55-57 infra, and the knife, see pp. 7, 22 supra. To paraphrase Gregg, "It is apparent that the Supreme Court of Georgia has [not] taken its review responsibilities seriously." Gregg, 428 U.S. at 205 (plurality opinion). Cf. id. at 224 (White, J., concurring).

2. The State's Evidence Wholly Failed to Establish That Section (b)(7) Applied

Under Godfrey, to sustain a death sentence premised solely on section section (b)(7), the State must prove beyond a reasonable doubt that there was evidence of serious physical abuse of the victim prior to death. 446 U.S. at 431, 432

(plurality opinion). The prosecution below introduced absolutely no evidence of the sequence of events surrounding the victim's death, nor of when the victim was killed. There is no evidence as to whether the victim was killed first and sexually abused later, or sexually abused and then killed. If she was killed first, there is no evidence of how much later she was sexually abused. Nor was there any evidence that the non-fatal knife wounds found on the body were inflicted before death. Indeed, the State's pathologist expressly admitted that he could not determine whether they were made before or after death. TT 295.

Therefore, no reasonable trier of fact could have found an essential element of section (b)(7) -- that the victim suffered serious physical abuse before being killed.* The jury therefore should not have been charged under section (b)(7), and the evidence does not support the finding of such an aggravating circumstance. The death sentence must be reversed. Godfrey, 446 U.S. at 431, 432 (plurality opinion); Jackson v. Virginia, 443 U.S. 307 (1979).

The Georgia Supreme Court in the present case incorrectly asserted that "[p]rior to being killed, the victim was raped and sodomized." 274 Ga. at ___, 274 S.E.2d at 323. This factual assertion is not supported by any evidence in the record. Moreover,

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* We cannot dispute that the victim's body was a gruesome sight when found and when examined by the pathologist who testified at trial. But in Godfrey, the plurality observed that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational." 446 U.S. at 433 n.16. Moreover, even in Georgia, not all "gruesome" murders produce death sentences. See, e.g., Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980) (brutal abuse of 9-month old victim prior to death, life sentence imposed; Fulghum v. State, 246 Ga. 184, 269 S.E.2d 455 (1980) (victim disembowled and stabbed 44 times in the trunk and chest, life sentence imposed).

whether serious physical abuse occurred before or after death is a factual inquiry that was peculiarly suited for determination by the jury. Because the jury below was not instructed to determine whether the physical abuse occurred before death, the Georgia Supreme Court in affirming the death sentence improperly relied on its postulated, but not proven, factual theory that the rape and sodomy occurred before death. See Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam) (death sentence may not be affirmed under a theory on which the jury was not instructed).

3. The Trial Court's Penalty Charge Concerning Jury Unanimity Was Unconstitutional

The trial court at the penalty phase instructed the jury that it must unanimously and beyond a reasonable doubt agree on one of three verdicts.* The trial court's unanimity

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* The judge instructed the jury:

> I Charge you that the form of your findings concerning punishment would be one of the following:
> The first, "We, the Jury, find the following statutory aggravating circumstance against the defendant: The offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, and we recommend the death penalty."
> The above finding would mean that the defendant would be put to death by electrocution.
> Another alternative, "We, the Jury, find the following statutory aggravating circumstance against the defendant: The offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, and we recommend mercy for the defendant."
> The above finding would mean that the Court would sentence the defendant to life imprisonment.
> The third alternative, "We, the Jury, do not find an aggravating circumstance and recommend life imprisonment."
> If the above should be your finding, it would mean that the court would sentence the defendant to life imprisonment.

(Footnote continues)

charge violated petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments in three respects.

First, the trial court improperly instructed the jury to make a finding in the disjunctive under section (b)(7). As described above, the second clause of section (b)(7) includes several elements -- "torture," "aggravated battery" and, perhaps, "depravity of mind." The jury must unanimously agree beyond a reasonable doubt on the same one or more elements of section (b)(7). See Fair v. State, 245 Ga. 868, 268 S.E.2d 316, 320, cert. denied, 101 S. Ct. 407 (1980). But the trial court below failed to charge the jury that the members must unanimously agree on the same one or more elements of section (b)(7), and the verdict that the jury returned is phrased in the disjunctive.* Thus, there is no way of knowing whether the jury in the present

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(Footnote continued)

> Now, let me emphasize at this point that when you unanimously agree beyond a reasonable doubt on one of the foregoing findings, your Foreman should write the particular finding on the reverse side of the indictment in the exact language as it is given to you.
>
> . . . .
>
> I believe I said unanimous, didn't I? It must be unanimous, as it was before. Okay, you may retire.

TT 679-80. The trial court also delivered this charge to the jury in typewritten form to take into the jury room. TT 678.

* The trial court specifically instructed the jury foreman to write out the exact language of § (b)(7) if the jury found the statutory aggravating circumstance. TT 680. The clerk published the jury's finding as:

> We the Jury, find the following statutory aggravating circumstances against the defendant: The offense of murder was outrageously or wantonly vile, horrible, or human, in that it involved torture, depravity of mind, or an aggravated battery to the victim, and we recommend the death penalty.

TT 680-81.

case unanimously agreed upon the existence of the same element of section (b)(7). For example, one juror might have found aggravated battery, but not torture or depravity of mind, while the remaining 11 jurors found torture, but not aggravated battery or depravity of mind. Under Georgia law, a split vote should have resulted in life imprisonment. See Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Petitioner therefore has been sentenced to die without an adequate basis for rational and meaningful appellate review of whether the jury unanimously recommended death on the basis of the same factual finding, in violation of his Sixth Amendment right to trial by jury, the Eighth Amendment prohibition against cruel and unusual punishment, and the Fourteenth Amendment guarantees of due process and equal protection.* "Such a risk

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* Because the jury must unanimously find an aggravating circumstance and must unanimously recommend death under the Georgia death penalty statute (see Miller, 237 Ga. at ___, 229 S.E.2d at 376; Gregg, 428 U.S. at 208, 211 (White, J., concurring), this Court need not decide whether jury unanimity is required in a state capital case under the Sixth, Eighth and Fourteenth Amendments, given the increased need for reliability in such cases (see Beck v. Alabama, 447 U.S. 625, 637-38 (1980)), even if unanimity is not required in a noncapital state criminal case (see Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972)). Because the Georgia Supreme Court in Miller and Fair has ruled that jury unanimity is required to find an aggravating circumstance and to recommend death, but is not required to fail to find an aggravating circumstance or to recommend life imprisonment, the State was required to apply this rule uniformly at petitioner's trial. Cf. Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959). Failure to do so violated petitioner's constitutional rights (1) to equal protection under the Fourteenth Amendment (see Yick Wo v. Hopkins, 118 U.S. 356 (1886); (2) to trial by an impartial jury under the Sixth Amendment, made applicable to the states under the Fourteenth Amendment (Duncan v. Louisiana, 391 U.S. 145 (1968)); (3) to due process of law under the Fourteenth Amendment (id.); and (4) to be free from cruel and unusual punishment under the Eighth Amendment.

cannot be tolerated in a case in which the defendant's life is at stake." Beck v. Alabama, 447 U.S. 625, 643 (1980). The death sentence therefore must be reversed. See United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (conviction reversed where court gave erroneous unanimity charge and it was impossible to tell whether all jurors agreed on the same theory of guilt); cf. Gardner v. Florida, 430 U.S. 349 (1977) (death sentence based on confidential presentence report not in the record provided no basis for adequate appellate review; sentence reversed).

Second, the trial court incorrectly instructed the jury that it must unanimously fail to find an aggravating circumstance and unanimously recommend life imprisonment (the second and third alternative verdicts quoted at pp. 57-58, n.*, supra). This charge was directly contrary to Georgia law. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976), interpreting Georgia Criminal Code section 26-3102 and Criminal Procedure Code section 27-2503(b), held that unless the jury at the sentence phase of a bifurcated capital trial unanimously finds at least one statutory aggravating circumstance and unanimously recommends the death penalty, the trial court may not sentence the defendant to death. If even a single juror fails to find an aggravating circumstance or fails to recommend death, the trial court may not retry the sentence phase before a new jury but must instead impose life imprisonment.* Thus, under Georgia law, jury unanimity is required only to find

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* Similarly, in Gregg, Mr. Justice White, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist, observed that under the Georgia statute the sentence will be life imprisonment, unless the jury unanimously finds at least one statutorily defined aggravating circumstance and unanimously determines that the death penalty should be imposed. 428 U.S. at 208, 211 (White, J., concurring).

an aggravating circumstance and to impose death. There is no requirement that a capital jury unanimously agree upon the absence of an aggravating circumstance or that it unanimously recommend life imprisonment.

The trial court's erroneous unanimity instructions unconstitutionally increased the chances that petitioner would receive a death sentence rather than life imprisonment, in violation of his Sixth Amendment right to trial by an impartial jury, the Eighth Amendment prohibition against cruel and unusual punishment, and the Fourteenth Amendment guarantees of due process and equal protection. The death sentence therefore must be reversed. See Witherspoon v. Illinois, 391 U.S. 510, 520-23 (1968); Ballew v. Georgia, 435 U.S. 223, 236 (1978) (five-person jury held unconstitutional in part because it diminished the chances of, and therefore infringed on a defendant's interests in, a hung jury, in violation of the Sixth and Fourteenth Amendments); Williams v. United States, 338 F.2d 530, 533 (D.C. Cir. 1964) (hung jury is as much a part of the jury system as a unanimous verdict); Huffman v. United States, 297 F.2d 754, 759 (5th Cir.) cert. denied, 370 U.S. 955 (1962) ("[A] hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise.") (Brown, J., dissenting).*

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* Although petitioner's appointed trial counsel did not specifically object to the plainly erroneous unanimity instructions in the trial court or on appeal to the Georgia Supreme Court, this does not constitute a waiver of the error and does not preclude this Court from reviewing the issue on certiorari for several reasons. First, petitioner objected to the aggravating circumstances instructions in the trial court and on appeal on the broader grounds that the instructions did

[Footnote continues]

Finally, the Court's charge gave the jury the unfair choice of having to find unanimously that there were "no aggravating circumstances,"* in the face of the gruesome color photographs submitted by the prosecution, as its only permissible alternative to finding aggravating circumstances in the specific

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[Footnote continued]

not adequately charge the jury, did not adequately guide the jury's sentence deliberation, and should have included more language that would have enabled the jury to recommend life imprisonment. See pp. 12-13, supra. Petitioner also challenged the death sentence in the trial court and on appeal on the ground that it was applied in an arbitrary and capricious manner. Id. The objection to the erroneous unanimity charge is a subsidiary objection fairly included within these broader objections, and therefore it is clear that petitioner did present his claim in some fashion to the state courts. See Beck v. Alabama, 477 U.S. 625, 630 n.6 (1980); Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973); cf. Supreme Court Rules, Rule 21.1(a). The absence of a clearer objection is excusable in light of the unsettled state of the law concerning section (b)(7) at the time of trial, on appeal, and even as of this filing. Second, a contemporaneous objection to an erroneous jury charge in a criminal case is not required under Georgia law. Thomas v. State, 234 Ga. 615, 617-18, 216 S.E.2d 859, 860-61; Ga. Code Ann. §§ 70-207(a), 70-207(c). Moreover, the Georgia Supreme Court had an independent statutory duty to determine whether the death sentence was imposed under the influence of prejudice or any other arbitrary factor, such as the plainly unconstitutional unanimity instruction below. See Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Ga. Code Ann. § 27-2537(c)(1); accord, Beck v. Alabama, 477 U.S. 625, 630 n.6 (1980); Gardner v. Florida, 430 U.S. 349, 361 (1977); Vachon v. New Hampshire, 414 U.S. 478 (1974). The Georgia Supreme Court has recognized that the jury charge in a death penalty case is so crucial to the outcome of the trial that it will review those charges whether or not objection was made in the trial court. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, 96, cert. denied, 439 U.S. 991 (1978). Third, there is no basis for presuming that the petitioner himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision to forego a correct unanimity instruction. Gardner v. Florida, 430 U.S. 349, 361 (1977); cf. United States v. Gipson, 553 F.2d 453, 456 n.4 (5th Cir. 1977) (right to unanimous jury cannot be waived).

* The trial court broadly defined "aggravating circumstances" as "those which increase the guilt or enormity of the offense and add to its injurious consequences." TT 678.

statutory language of section (b)(7), i.e., that the crime was "outrageous or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." By giving such false alternatives to the jury here, together with the gruesome photographs, the trial court vastly and impermissibly increased the prospect of the jury finding, as it did, that an aggravating circumstance existed as defined in section (b)(7).

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE JURY, CONFRONTED DURING THE PENALTY PHASE WITH GRUESOME COLOR PHOTOGRAPHS EXCLUDED FROM THE GUILT TRIAL BECAUSE THEY WERE INFLAMMATORY, IMPOSED THE DEATH SENTENCE ON THE BASIS OF EMOTION, PASSION, OR CAPRICE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The only new evidence introduced at the sentence phase of petitioner's trial consisted of five gruesome color photographs of the victim's body taken at the morgue on the day after the police found the body. The trial court excluded these grisly photographs at the guilt phase expressly because they were "highly inflammatory" and prejudicial, and had no probative value since the prosecution could establish the facts concerning the alleged murder, rape, and sodomy through less inflammatory medical testimony. TT 251-52.* Nonetheless, at the sentence phase the prosecutor displayed such a petulant interest in the photographs ("Now can I get my pictures into evidence?" TT 671) that the court,

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* The trial court stated:

> I do believe the pictures are highly inflammatory and I think that that inflammatory nature of the pictures would outweigh any probative value they might have, especially since the State can establish the fact of rape and sodomy by medical means.

TT 252.

while acknowledging that the photographs were "extremely inflammatory," admitted the evidence over defense counsel's objections. Id. The trial court and the prosecutor then compounded the prejudice by informing the jury that the photographs had been excluded from the guilt phase because "we didn't want to inflame your minds." TT 672; accord, TT 671.* The message to the jury was crystal clear: At the sentence phase the State could justifiably arouse their passions, and the jury could properly succumb to these inflammatory tactics and sentence petitioner to die.

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* The following discussion concerning the photographs occurred at the sentence phase:

> MR. RYAN: Now can I get my pictures into evidence?
> THE COURT: Yes. Do you want to object?
> MR. McGLASSON: I certainly do want to object. They are extremely inflammatory.
> THE COURT: I agree . . . .
> . . . .
> THE COURT: The State has moved to introduce certain photographs of the deceased, which I would not allow in the guilt or innocence phase of the trial, because it was my opinion that it was only necessary to establish the cause of death at that time and that Doctor Guerry could do that.
> The State now tenders these photographs, I allowed them over objections in this sentencing phase of the trial, and they will be admitted as Exhibits [A-E].
> . . . .
> MR. RYAN: Ladies and Gentlemen of the Jury, what I'm getting ready to show you now, I'm going to show it to you reluctantly, it's very bad, very horrible. . . .
> . . . .
> These particular pictures were kept out during the main trial of this case and the reason they were kept out, in the Judge's wisdom, and I think he's right, we didn't want to inflame your minds.

TT 671-72.

The trial court and the prosecutor thus guaranteed that the jury would return a death sentence on the basis of caprice or emotion rather than reason, in violation of the Eighth and Fourteenth Amendments. As this Court observed in Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion), "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." The Court reaffirmed this principle in Godfrey (reversing a death sentence which could not be said to be "'based on reason rather than caprice or emotion,'" 446 U.S. at 433, quoting Gardner, 430 U.S. at 358), and yet again in Beck v. Alabama, 447 U.S. 625, 637-38 (1980). Indeed, in Gregg the Court upheld Georgia's death penalty statute against an Eighth Amendment challenge in part because of the statutory mandate that a death penalty must be reversed if it "was imposed under the influence of passion, prejudice, or any other arbitrary factor" (Ga. Code Ann. § 27-2537(c)(1)). See Gregg, 428 U.S. at 198. In its earlier capital cases, this Court similarly paid careful heed to the constitutional concern that the decision to extinguish the life of an individual must not be the product of passion or emotion. See, e.g., Irvin v. Dowd, 366 U.S. 717, 728 (1961) ("[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion"); Moore v. Dempsey, 261 U.S. 86, 91 (1923) (due process prohibits deprivation of an accused's life where "counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion").

Under common law evidentiary principles, gruesome evidence must be excluded when, as in the present case, the danger of passion and prejudice outweighs the probative value of the

evidence. See, e.g., Maxwell v. United States, 368 F.2d 735, 739-40 (9th Cir. 1966); Holcomb v. State, 130 Ga. App. 154, 155 202 S.E.2d 529, 531-32 (1973); Commonwealth v. Batty, 482 Pa. 173, 177, 393 A.2d 435, 437-38 (1978). In capital cases, this common law prohibition against unnecessary injection of passion into the decision-making process rises to a constitutional level. When, as here, photographs of the victim's body are admitted into evidence even though their admission adds nothing factual and serves no purpose other than to inflame the passions of the jury, it cannot be said that the ensuing sentence of death both is, "and appear[s] to be, based on reason rather than caprice or emotion." Gardner, 430 U.S. at 358; accord, Godfrey, 446 U.S. at 433; Beck, 447 U.S. at 637-38.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION INTO EVIDENCE OF PETITIONER'S PRETRIAL STATEMENT TO INVESTIGATORS CONSTITUTED GROSS PROSECUTORIAL MISCONDUCT CREATING SUCH FUNDAMENTAL UNFAIRNESS AS TO DENY PETITIONER DUE PROCESS OF LAW.

On February 25, 1978, six days after Valerie Armstrong's murder, petitioner learned that his house had been illegally searched in connection with the investigation of the crime and that he might be a suspect. Voluntarily, he went to the Chatham County Police and submitted to interrogation by two detectives. TT 422. In the course of this interview, the detectives asked numerous questions containing knowingly false and inflammatory allegations in an attempt to provoke petitioner into a confession or an incriminating statement. These tactics proved unsuccessful. petitioner steadfastly maintained his innocence and ignorance of the crime. Nevertheless, the transcript of this statement, with

only minor deletions, was read to the jury as part of the State's case-in-chief (TT 413-504), although the prosecutor admitted it was relevant only to impeach petitioner's credibility. TT 397.*

A. By His Use Of The Statement, The Prosecutor Knowingly Placed Before The Jury False Evidence, Inadmissible Evidence, And Unfounded Assumptions And Innuendo Calculated To Prejudice And Inflame The Jury

Examination of the lies, half-truths and innuendo which, framed as questions, were placed before the jury in the course of reading this statement compels the conclusion that the jury could not have remained unbiased towards petitioner after hearing it. It undoubtedly colored their view of petitioner's subsequent trial testimony, and their deliberations as to his guilt or innocence and sentence. We submit that the reading of this statement constituted prosecutorial misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process" requiring reversal. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Prior to taking this statement from petitioner, local detectives had conducted a search of his house and seized certain evidence. The State agreed at the outset of trial that this search was illegal, and the prosecutor stipulated in lieu of a suppression hearing that he would not use any of the evidence seized in that search. TT 168-69. Defense counsel specifically objected to all

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* The prosecutor thus unconstitutionally turned the law of evidence on its head and impeached petitioner before petitioner had indicated in any way that he intended to waive his Fifth Amendment right to remain silent and testify at trial.

references "which might appear to any article of clothing or bedsheet or anything else taken from the residence of Mr. Nelson." TT 168. Despite this clear and unequivocal agreement, the prosecutor proceeded to read to the jury* questions from the statement which sought to tie petitioner to the crime by repeatedly asking him to explain the presence of fresh blood on his mattress (TT 455-56, 461, 490), and on sheets found in his garbage dump. TT 464. There is also the suggestion that bloody clothes (TT 462-63, 488) and underwear (TT 489-90) belonging to Mr. Nelson were found in the house. Nelson explained that the blood on the mattress and sheets "[m]ust be [from] a woman on her monthly thing" (TT 455), and identified the woman as Diane Knight, his steady girlfriend. TT 456. But the jury could not help but infer that the detectives believed the blood to be that of the victim. And, if the jury needed help in making that connection, the prosecutor read a question in which the detective stated, "You go on believing that. I'm telling you that that was the little girl's blood, Gary." TT 465.

In fact, the State knew that the blood was not the victim's. The victim had type O blood, and the blood on the sheets in petitioner's garbage was type B. TT 468-70. There is nothing in the record which indicates that any blood-stained clothing ever existed.

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* Initially a tape recording of the statement was played to the jury after defense counsel objected that the transcript contained inaccuracies and failed to convey the tone of voice and attitude of petitioner's inquisitors. TT 408, 464-65, 469. However, the court then ruled that the tape was inaudible and directed that the transcript be read. TT 425. The district attorney then read the detective's questions and the detective read petitioner's responses. TT 429. That the jury heard the questions directly from the prosecutor's lips only could have increased the bona fides which the jurors attached to them and compounded the prejudice to petitioner.

In Miller v. Pate, 386 U.S. 1, 7 (1967), this Court freed a state prisoner who had been convicted after the prosecutor introduced false evidence similar to that used here. In Miller, the state introduced a pair of blood-stained shorts which the state's expert identified as being the same blood type as the murder victim's. Id. at 3-4. The prosecution advanced the theory that defendant had been wearing the shorts when he committed the murder and afterwards discarded them because of the incriminatory stains. After trial, the defense learned that the "blood" stains were, in reality, paint and that the prosecutor had known this during the trial. Id. at 5, 6. Finding that the prosecution had deliberately misrepresented the truth, this Court reversed the denial of defendant's habeas corpus petition. Id. at 7.

After painting a picture of a house awash in blood, the prosecutor below introduced other spurious evidence through the pretrial interrogation in an attempt to connect petitioner and the victim:

> Q. What would her fingerprints be doing in her [sic] bedroom?
> A. Fingerprints in my bedroom?
> Q. I said what would her fingerprints be doing in your bedroom?
> A. That fingerprints ain't got no right being in there, because she ain't never been in it.
> Q. What would her earring be doing in your bedroom?
> A. Earring?
> Q. Uh-huh.
> A. It ain't got no right being in there, because she ain't never been in my house.

TT 470-71. However, as one of the detectives admitted on cross-examination, neither an earring nor fingerprints belonging to the victim were found in petitioner's house. TT 509-10. In fact,

nothing found in petitioner's house during the illegal search in any way connected him with the murder.* TT 512-13.

Admission of this evidence, despite the prior agreement to suppress and despite the total lack of a factual predicate for the investigators' questions, seriously prejudiced the defense in two ways. First, it placed before the jury the inference, totally false and unfounded, that substantial physical evidence existed connecting petitioner to the crime. Given the circumstantial and contradictory nature of the legitimate evidence on this crucial point,** it is impossible to conclude that such an inference had no effect on the jury in reaching its verdict. Perhaps more seriously, the prosecutor's misuse of the pretrial statement created the impression in the jurors' minds that highly relevant evidence had in fact been seized which would have helped them find petitioner guilty, but that this evidence was being withheld from them as the result of some "legal technicality" employed by the defense. The defense was placed in the untenable position of objecting within hearing of the jury to evidence which was clearly inadmissible in the first place. Presented in this fashion, the pretrial interrogation and the concededly illegal search, which in reality yielded only exculpatory evidence,

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* In addition to the blood, the earring, and the fingerprints, the jury also learned that petitioner kept masking tape in the house which he used to work on cars. TT 492. In light of the fact that the knife claimed to have been the murder weapon was wrapped in masking tape, that may not have been an insignificant bit of information. The record shows, however, that forensic tests conducted by the FBI conclusively proved that tape illegally seized from petitioner's house did not match the tape on the knife. TT 383-84. Unfortunately, this fact came out in testimony given the day before the statement was read, and the jury was never informed that these tests had been performed on the same tape referred to in petitioner's pretrial statement.

** See Part I, supra.

became incriminating in the jurors' minds as a result of what they failed to hear.* While some of the damage as to specific pieces of false evidence may have been partially cured by defense counsel's cross-examination of the detective (TT 509-10, 512-13),** the subtler prejudice created by this "hidden evidence" was, in reality, impossible to cure.

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* That the jury was concerned about what it was not hearing is illustrated by the following colloquy which occurred after defense counsel objected to the question concerning the victim's fingerprints "found" in petitioner's bedroom:

> MR. McGLASSON: Could we ask that the jury be excused for one second?
> THE COURT: All right, step in the jury room.
> JUROR: Your Honor?
> THE COURT: Yes, sir?
> JUROR: Could I ask a question before - had we been listening to the tape, would any of this have been edited out?
> THE COURT: Would any of it have been edited? Sometimes questions are asked - you mean has any of the transcription been edited?
> JUROR: No, sir; had we been listening to the tape, would any of it have been edited, that we would not have heard? Would we have heard everything on the tape that they are now ---
> THE COURT: Well, some things are just not admissible in an interrogation of this kind. When you get into a courtroom, it gets a lot more technical. What they might ask a person outside the courtroom - - -
> JUROR: But had the tape been running, would we have heard everything?
> THE COURT: Oh, I assume - I don't know; would they?
> MR. RYAN: No.
> MR. McGLASSON: No; that would had to have been edited out. We would have had to stop them.
> THE COURT: Okay, step out for a moment.

TT 466-67. It is doubtful that the juror's mind was set at ease by the judge's statement that he didn't know whether the jury would have "heard everything" had the tape been played and that "When you get into a courtroom, things get a lot more technical."

** Defense counsel did elicit on cross-examination that the police found no earring, fingerprint, or gun, and that the blood on the sheets found in the garbage was not the same blood type as the victim's.

Aside from misepresenting the physical evidence found in the search, the statement placed before the jury other inadmissible and prejudicial information and innuendo regarding petitioner's prior criminal record, deviant sexual propensities, and general character. In the course of reading the statement, the prosecutor informed the jury that petitioner had met Ray McCray, the victim's father, while serving time in a reformatory (TT 428); that a warrant had recently been sworn out against him for an aggravated assault on Diane Knight's "little sister" (age unspecified) (TT 456-57); that he had been in jail for an aggravated assault "with my girlfriend" (TT 490); and that he had been involved in an automobile accident which was the subject of a police investigation. TT 438-39.*

Perhaps even more damaging was the following exchange:

> Q. Have you ever been arrested on any sexual offenses before?
> MR. McGLASSON: Your Honor, - - -
> THE COURT: Leave that out.
> MR. McGLASSON: I've tried to be tolerant of all the other references and the rambling nature of this interview, but we're going to have to be careful at this point.
> THE COURT: Yes. Don't ask any questions like that.
> (NOTE: A portion of the transcription was then excluded.)
> THE WITNESS: Down at the bottom of page 30, Detective Lietz asked him, "Do you have a car now?"

TT 461. The jury was thus left with the impression that, but for the objection of defense counsel, they would have heard highly relevant (though clearly inadmissible) testimony that petitioner had a history of sex offenses. In fact, the Report of the Trial Judge filed in the Georgia Supreme Court indicated that petitioner

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* In addition, the inference was raised that petitioner used cocaine and heroin (TT 500), and had spent time in a mental institution. TT 499.

had never been convicted of a sex crime. Report of the Trial Judge at 5. The jury, however, was never apprised of this fact.

Federal courts have frequently found similar prosecutorial misbehavior grounds for reversal of state convictions. For example, in Watkins v. Foster, 570 F.2d 501, 506 (4th Cir. 1978), defendant in a burglary case was cross-examined about six other burglaries as to which the state "could not, and did not, offer any extrinsic evidence" of defendant's complicity. The Court of Appeals clearly explained why such questioning was a denial of due process:

> Foster's entire defense rested on his credibility, and thus the prosecutor's attack on this credibility was critical. Foster's denial of the prosecutor's insinuations in theory should have left his credibility intact but in actuality could not erase the blemish on his character which had been left in each juror's mind.

Id. At the felony-murder trial of a different Mr. Foster in Foster v. Barbour, 613 F. 2d 59, 60 (4th Cir. 1980), the prosecutor posed a series of questions asking defendant if he had been convicted of several other felonies. The Court of Appeals affirmed habeas corpus relief, stating:

> We agree with the district court that the repeated assertion that Foster had been convicted of other crimes, particularly larceny and robbery, when those assertions were untrue, in a trial on the charge of homicide in the course of a robbery, destroyed the fairness of Foster's trial and denied him due process of law. The attack on the defendant's veracity played a critical role in the trial. . . . Foster's denials of the prosecutor's accusations "could not erase the blemish on his character" created by the persistent questioning and apparent reliance on court documents.

Id. Petitioner's credibility was similarly damaged by the questions regarding other "sexual offenses" and prior run-ins with

the law, and the damage was compounded by the fact that his credibility was attacked before he took the stand.*

The impression that Nelson regularly engaged in aberrant sexual behavior was reinforced by the following line of questions -- also totally unsupported by evidence when asked and when read at trial:

> Q. Do you have any tendencies sexually toward men?
> A. How do you mean?
> Q. Do you have homosexual tendencies?
> A. No, I don't mess around with homosexuals and I try to teach them not to mess around with me.
> Q. How do you teach them?
> A. By letting them know that I'm all man and I don't go no [sic] freakish areas. I don't mess around like that.
> Q. You never wear any women's dresses or anything, do you?
> A. No, I don't.
> Q. Okay, you never wear dresses?
> A. Never wear dresses.
> Q. Okay, it's just - I'm not saying I think you do, I'm just asking a question. When is the last time you had intercourse with a woman in your bed and who was that woman?
> A. Last night.
> Q. Last night? Who was that woman?
> A. Brenda Butler.
> Q. Brenda Butler?
> A. Yes.
> Q. She having her period?
> A. Not that I know of.
> . . . .
> Q. Okay, you got all the time you need. Let me ask you this question, maybe this will help; when was the last time that you had sexual intercourse with a woman who was having her period and what was that woman's name?
> A. You know like this, a woman ain't going to let you know her period on if she going to do something with you.
> Q. You going to know when you pull it out.
> A. Not all the time, not - you don't know.
> Q. You going to know when you wake up in the morning and see the mess.
> A. I don't look that much, 'cause I get up in the morning, it be dark.

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* See p. 67 n.* supra, and accompanying text.

Q. We are talking about a large amount of blood on your mattress, a lot of blood. You ought to know where it came from.

A. It be from some woman. It won't be no six-year old girl, I can assure you of that, that what I mean, and - well, I can assure of that, 'cause I don't know why this led to me. I was wanting to find out, you know, myself.

TT 457-58, 460-61. The prosecutor also seemed to feel that it was relevant for the jury to know with whom petitioner had slept in the weeks preceding the crime. See TT 458-60.

Facts can be rebutted with facts. But what words can adequately redress the prejudice engendered in the minds of jurors left with the lurid impression, unsupported by a single shred of evidence, that petitioner was a sexual deviate who sought sexual gratification amidst the touch, feel, and smell of a woman's blood?* Particularly here, where the jury was charged with dispassionately deciding if petitioner committed the murder of a child -- a murder with sexual overtones -- it is impossible to conclude that the improper use of this statement "could [not] . . . in any reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1972).

Finally, as the reading of the interrogation was drawing to a close, the jury learned that petitioner had been asked the following patently inflammatory questions which might, by themselves, have been grounds for a mistrial in a more enlightened jurisdiction: "Q. Maybe you forgot that particular time when you went ahead and dumped the little girl's body" (TT 498), and "Q. Is that when you went and got rid of the little girl's body?" TT 503. Although the prosecutor had stated in his

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* Defense counsel made a half-hearted attempt to mitigate the effect of this testimony on cross-examination, but it was quickly abandoned. TT 510.

opening remarks that the state would show the murder occurred at the site other than that where the victim was found, TT 176, no evidence to that effect was introduced. Once again, a policeman's unfounded question was deviously used by the prosecution as affirmative evidence of petitioner's guilt.

Since the State introduced no evidence supporting any of the matters covered in its reading of petitioner's pretrial statement, the prosecutor -- who used the statement as part of his case-in-chief -- must be charged with knowledge that there was no basis in fact for the questions the police had asked petitioner.* This pretrial statement constituted approximately one third of the testimonial evidence introduced by the State against petitioner. As demonstrated above, it was replete with false, unsupported, and inflammatory references, and reading it to the jury can only be characterized as flagrant prosecutorial misconduct calculated to inflame the jury and to deny petitioner the fair trial which due process requires.

B. The Prosecutor's Use Of The Statement So Infected The Trial With Unfairness As To Deny Petitioner Due Process of Law

The appropriate standard for review of state criminal cases in which a violation of due process is claimed as a result of prosecutorial misconduct was established in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). We submit that the prejudice injected into petitioner's trial "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 643.

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* Moreover, as we have shown, there is clear evidence in the record itself that most of the matters covered had no basis in fact.

In deciding such questions, the federal courts weigh several factors: the nature of the misconduct, its materiality to the issues in the case in light of the record as a whole, its likely effect on the trier of facts, and any factors vitiating the taint.

Regarding the nature of the misconduct, this Court has long held that a state criminal conviction obtained by the knowing use of false evidence cannot be tolerated under the Fourteenth Amendment. Giglio v. United States, 405 U.S. 150, 153 (1972); Miller v. Pate, 386 U.S. 1, 7 (1967); Napue v. Illinois, 360 U.S. 264, 269 (1959); Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (per curiam); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112-113 (1935). This rule applies even if the prosecution, while not soliciting false evidence, allows it to go uncorrected or allows the jury to be presented with a materially false impression.*

As a public official and officer of the court, the prosecutor occupies a special position of public trust. Mr. Justice Sutherland eloquently explained the role of a federal prosecutor:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a

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* See, e.g., Napue v. Illinois, 360 U.S. at 269 (prosecutor failed to correct testimony of witness that he had not been offered consideration in exchange for his testimony); Alcorta v. Texas, 355 U.S. at 31, (prosecutor failed to correct false testimony of sole eye-witness to murder which left jury with false impression of relationship between witness and victim; United States v. Anderson, 574 F. 2d 1347, 1355 (5th Cir. 1978).

> peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935); see, Donnelly v. DeChristoforo, 416 U.S. at 648-49 (Douglas, J., dissenting). These duties apply with equal force to state prosecutors. See, e.g., Miller v. North Carolina, 583 F.2d 701, 706 (4th Cir. 1978); Imbler v. Craven, 298 F. Supp. 795, 808-09 (C.D. Cal. 1969), aff'd sub nom. Imbler v. California, 424 F.2d 631 (9th Cir.) cert. denied., 400 U.S. 865 (1970). The average jury is likely to give great weight to what the prosecutor says, in the reasonable expectation that he is faithfully observing these obligations. Berger, 295 U.S. at 88; United States v. Herberman, 583 F.2d 222, 230 (5th Cir. 1978); King v. United States, 372 F.2d 383, 396 (D.C. Cir. 1967).

By using petitioner's statement, the prosecutor below, far from exemplifying the Berger paradigm, failed to meet even minimum standards of prosecutorial responsibility.* It is

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* See the ABA Code of Professional Responsibility, DR 7-106(C) (trial conduct), which requires:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

See also ABA Project on Standards for Criminal Justice, The Prosecution Function §§ 1.1(b)-(d), 2.8(a), 5-6(a)(b), 5-7(a)(b)(1974).

immaterial that the objectionable "evidence" here reached the jury in the form of questions asked, rather than in a false or misleading reply by a witness. By offering petitioner's pretrial statement in evidence as part of his case-in-chief, the prosecutor here adopted the detectives' questions as his own; yet "[i]t is misconduct for a prosecutor to make an assertion to the jury of a fact, put in the form of an assumption of a question, unless the prosecutor proffers direct testimony of that fact." King v. United States, 372 F.2d 383, 394 (D.C. Cir. 1966).

The prosecutor offered no testimony to support the "facts" assumed in his questions. Moreover, questions which, while not specifically assuming false "facts," nonetheless left the jury with a false impression, were no less "false" for purposes of assessing the prosecutor's misconduct. As the court stated in Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967), "Evidence may be false . . ., though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." The demands of the Fourteenth Amendment are not met when and if "evidence" of this type goes uncorrected. Id. at 395.

The prosecutor in this case effectively "introduced" several pieces of nonexistent physical evidence by means of the statement. The questions about the victim's earring and fingerprints "found" in petitioner's room clearly left the impression that such evidence existed when in fact the questions were sheer fabrication. The jury was also told of a bloody mattress, bloody sheets, bloody clothing, and bloody underwear apparently found

during the illegal search of petitioner's home.* And they heard the prosecutor say -- while playing the role of inquisitive detective -- "you go on believing that. I'm telling you that that was the little girl's blood, Gary." TT 465. In fact, the prosecutor knew it was not the victim's blood at all.**

Besides alluding to nonexistent physical "evidence," the questions about homosexuality, transvestitism, and sexual intercourse with women in their menstrual cycle left the clear impression that petitioner's sexual preferences ran to the perverse. This impression was reinforced by the "hidden evidence" suggested by the unanswered -- and clearly inadmissible -- question

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* In light of his prior agreement to refrain from any reference to this search, all questions regarding items actually or supposedly found in petitioner's home were improper and violated the Fourteenth Amendment's due process guarantee. See Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963).

** At one point, perhaps in recognition of his duty to clear up any false impressions left by the evidence he presented, the prosecutor expressly promised the court and defense counsel that he would correct the testimony in the statement to the effect that the blood on petitioner's sheets was that of the victim.

> MR. RYAN: I am prepared before the jury gets this case to tell them that the sheet taken out of the room, the blood found on it, was classified as Blood Type B, if Mr. McGlasson will so stipulate.
> MR. McGLASSON: I will, sir, because I think that it's important. The whole context and the accusations and the method of the investigation - - -
> THE COURT: This jury's going to want to know the answer. At this stage, it's not before them, except in the accusations of the question, and there's no evidence that the sheet contained type O and I think it needs to be clarified. An oral statement is sufficient for the Court if it is for the Defense Counsel.
> MR. McGLASSON: We will stipulate it, so that they can clarify it.

TT 469-70. No such corrective statement was ever made.

regarding prior sexual offenses.* Finally, the prosecutor -- throwing the rules of evidence out the front door while inviting prejudice through the back -- implanted the notion that petitioner was a man with a history of violent crime, misconduct, and incarceration. The message to the jury was clear: Here is a man capable of committing the crimes depicted by the inflammatory photographs shown to the jury at the penalty phase.

Once prosecutorial misconduct has been established, Giglio holds that the prejudice caused must be found "material" in light of all the evidence in order to warrant reversal. 405 U.S. at 154; accord, United States v. Anderson, 574 F.2d 1347, 1355-56 (5th Cir. 1978). Misconduct is material if "the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial," Napue v. Illinois, 360 U.S. at 272, or "could . . . in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154. Thus, the critical factor in assessing materiality under this standard is the strength of the remaining, untainted evidence.

As shown above, the evidence linking petitioner to this crime is so weak as to be constitutionally infirm.** Three grand juries, when presented with this evidence, found it insufficient to indict, let alone convict.*** Finally, the trial court compounded the damage by failing to caution the jury on the proper consideration to be given to the statement. Not once during

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* See pp. 72-73, supra.

** See Part I, supra.

*** See Transcript of Pretrial Hearing (April 4, 1979), passim.

the reading of the statement, even after an objection had been made, did the trial court instruct the jury to disregard what it had heard, and no specific mention was made of petitioner's pre-trial statement in the jury charge. The trial court did not even bother to give the jury the customary cautionary instruction not to rely on statements of counsel, but to rely solely on the testimony.*

In light of this lack of instruction and the paucity of proof, there is more than a "reasonable likelihood" that the reading of the statement "could have" or "may have" affected the jury's decision to convict petitioner and take his life. We therefore submit that the reading of the statement was material prosecutorial misconduct requiring reversal of petitioner's convictions.

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* See King, 372 F.2d at 396. In Watkins, 570 F.2d at 506, where the prosecutor had asked a series of impermissible questions regarding prior criminal conduct, the court stated:

> Aggravating the highly prejudicial nature of the questions was the fact that the trial judge never gave the jury any limiting instructions -- never told them that they could only consider the exchange between the prosecutor and Foster on the issue of Foster's credibility and never reminded them that nothing the prosecutor said was itself evidence.

CONCLUSION

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant the petition for a writ of certiorari.

Dated: May 26, 1981

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NELSON v. STATE
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NELSON

v.

The STATE.

No. 36555.

Supreme Court of Georgia.

Jan. 27, 1981.

Defendant was convicted in Superior Court, Chatham County, Frank S. Cheatham, Jr., J., of murder, aggravated sodomy, and rape, and appealed. The Supreme Court, Marshall, J., held that, inter alia: (1) the trial judge did not err in overruling defendant's motion for acquittal on ground that two grand juries had returned no-bills of indictment; (2) trial judge did not err in overruling defendant's motion to dismiss for denial of defendant's constitutional right to speedy trial; (3) trial judge did not abuse discretion in overruling motion for change of venue; (4) trial judge did not err in failing to charge jury in exactly language requested; (5) trial judge did not abuse discretion in admitting photographs, depicting injuries to victim, in evidence at presentence hearing; (6) imposition of consecutive life sentences for rape and aggravated sodomy did not violate Eighth Amendment ban on cruel and unusual punishment; and (7) sentence to death for murder was not excessive or disproportionate,

considering both the crime and the defendant.

Judgment affirmed.

Hill, P. J., concurred specially and filed opinion.

1. Homicide ⇐250
Rape ⇐51(1)
Sodomy ⇐6

Evidence, in prosecution for murder, aggravated sodomy, and rape was sufficient to support conviction.

2. Bail ⇐51

In prosecution for murder, aggravated sodomy, and rape, trial judge did not abuse his discretion in setting bail at $10,000. Code, § 27-901.

3. Indictment and Information ⇐16

Although two returns of no bills by grand jury generally bars the prosecution for same offense, mere failure of grand jury to indict does not constitute return of no bill; thus, where grand jury deferred voting on bill of indictment in order to permit district attorney further time for investigation, to locate key witness, trial judge did not err in overruling motion for acquittal on ground that two grand juries had returned no-bills of indictment. Code, § 27-702.

4. Indictment and Information ⇐7

Delay in return of indictment because key witness could not be located was legitimate delay and did not constitute deliberate prosecutorial delay for tactical advantage. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐577.15(3)

Where, although length of delay between arrest and trial was 22 months, during some of this time accused was in jail under conviction of involuntary manslaughter, and accused was released on habeas corpus approximately ten months prior to trial, where indictment was delayed because key witness could not be found, where accused asserted right to speedy trial by filing demand for indictment several months after his arrest, and where accused had not shown any way in which his defense was impaired by delay, trial judge did not abuse discretion in ruling that accused had not been denied Sixth Amendment right to speedy trial. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐1208(1)

State is not required to serve defendant with notice of statutory aggravating circumstances it intends to prove. Code, § 27-2534.1(b)(7).

7. Criminal Law ⇐126(1)

Where there was no evidence in record that there was such widespread, adverse, pretrial publicity that prospective jurors could not lay aside their opinions and render verdict based solely on evidence, trial judge did not abuse discretion in overruling motion for change of venue.

8. Jury ⇐33(1)

Fact that two prospective jurors were properly excused for cause in prosecution for murder, aggravated sodomy, and rape, did not deprive accused of right to jury selected from representative cross section of community.

9. Jury ⇐107

Trial judge did not commit error in refusing to strike for cause prospective juror in prosecution for murder, aggravated sodomy, and rape, who stated on voir dire that he believed burden of proof on state to be too high where prospective juror further stated that he could lay aside personal opinions as to burden of proof and follow whatever instructions trial court might give.

10. Criminal Law ⇐339.7(3)

Since photographic array shown to witness by police was not impermissibly suggestive, trial judge did not err in overruling defendant's motion to suppress witness' pretrial identification of accused from photographic array.

11. Criminal Law ⇐438(3)

Trial judge did not commit error in allowing photograph of accused to be introduced as exhibit at trial where trial judge found such photograph to be that which witness had picked out of photographic array.

12. Criminal Law ⇐412(1)

Trial judge did not abuse discretion in admitting transcripts of pretrial statements given by accused to police.

13. Criminal Law ⇐785(6)

Failure to give jury instruction that without corroboration one cannot be convicted of crime upon hearsay testimony as to statements of child who is incompetent as witnesses because too young to appreciate nature and sanctity of oath, was not error where there was corroboration of child witness' testimony and pretrial statements, and she was not found to be incompetent as a witness.

14. Criminal Law ⇐834(2)

Where requests to charge were given in substance by trial judge, failure to charge in exactly language requested was not error.

15. Criminal Law ⇐438(5)

Trial judge in prosecution for murder, aggravated sodomy, and rape did not abuse discretion in admitting in evidence, at presentence hearing, photographs depicting injury to victim.

16. Criminal Law ⇐1213

Imposition of death penalty on circumstantial evidence alone is not unconstitutional.

17. Criminal Law ⇐1213

Imposition of consecutive life sentences for rape and aggravated sodomy did not violate Eighth Amendment's ban on cruel and unusual punishment. U.S.C.A.Const. Amend. 8.

18. Criminal Law ⇐1213

The method of execution in the state does not constitute cruel and unusual punishment. U.S.C.A.Const. Amend. 8.

19. Criminal Law ⇐338(1)

Trial judge did not err in admitting evidence concerning accused's roommate, since in order for State to prove its case against accused, it was necessary for State to exclude possibility that roommate, who also had access to murder weapon, could have committed the murder, and evidence concerning roommate, was, therefore, relevant to issue of accused's guilt or innocence of murder charge.

20. Criminal Law ⇐354

Where jury was fully authorized in finding from evidence that murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," death penalty for murder was not excessive or disproportionate, considering both the crime and the defendant. Code, § 27-2534.1(b)(7).

Howard A. McGlasson, Jr., Savannah, for plaintiff.

Andrew J. Ryan, III, Dist. Atty., Arthur K. Bolton, Atty. Gen., John W. Dunsmore, Jr., Asst. Dist. Atty., Savannah, for the State.

MARSHALL, Justice.

The appellate, Gary X. Nelson, was convicted of murder, aggravated sodomy, and rape. The jury found that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). The appellant was given the death penalty for the murder conviction, and he was given consecutive life sentences for the rape and aggravated-sodomy convictions.

The state presented evidence at trial to the following effect:

The victim was a six-year-old girl, and the appellant and the victim's family were neighbors, living one-half block from each other.

The victim was reported missing on the evening of Sunday, February 19, 1978. On that morning, the appellant had gone to the victim's home to borrow a wrench from her stepfather, Ray McCray. There is testimony that the appellant drank some vodka at the McCray residence, and then Mr. McCray accompanied the appellant back to the appellant's house to help the appellant do some work on his Volkswagen. Around

dusk, they returned to the McCrays. Mr. McCray testified that his children were playing in the yard and he pointed the victim out to the appellant, stating, "That's my little girl right here." McCray testified that the appellant replied, "Yeah, I know, that's my little buddy because she comes down to the house all the time to go to the store for us." According to Mr. McCray's testimony, the appellant then went back into the McCray residence, had another drink of vodka, and then returned to his own home.

Sabrina Williams, who is eight years old, testified that she was playing with the victim around dusk on the Sunday the victim disappeared. She and the victim went to the store, but the victim did not have any money. Sabrina testified that on their way back from the store, the victim left her in order to go to the appellant's house to get some money. The victim referred to the house as "Uncle Al's house." The appellant's roommate was Alphonso Swinton. The last time Sabrina saw the victim, the victim was walking toward this house and there was a man working on a Volkswagen in the yard. A few days later, Sabrina identified the appellant from a photographic array as the man working on the Volkswagen. However, she testified at trial that the appellant was not the man.

The victim's body was discovered in a wooded area near her house on Monday, February 20th. The victim had been brutally raped, sodomized, and stabbed. A distinctive-looking knife with tape wrapped around its handle was found within several feet of the body. Seminal fluid found on the victim's coat contained a blood type which is the same blood type as the appellant's, which is blood type O. (There is evidence that 44% of the population have this blood type.) Forensic evidence established that a hair found on the victim could have come from the appellant's arm, but could not have come from the arm of the appellant's roommate, Alphonso Swinton. (There is evidence that approximately 123 people in the area would have similar hair samples.)

There is testimony that during the police investigation of the case, the appellant's girl friend, Diane Knight, identified the knife found at the scene of the murder as being the appellant's knife. An investigating police officer also testified that Diane Knight informed the police that the appellant had instructed her not to identify the knife. At trial, she repudiated her earlier statement to the police that the knife was the appellant's, and she testified that this was not the appellant's knife. However, there was testimony from another witness that this was the knife in the appellant's house. At trial, Ms. Knight, also repudiated a pretrial statement which she had given to the police in which she maintained that she had been with the appellant during the day and evening of February 19. Ms. Knight testified at trial that she had not been with the appellant during this time.

The victim's stepfather testified that on Tuesday, February 21, he received an anonymous telephone call from a person whom he identified as the appellant. McCray testified that the appellant told him that "a fellow on the east side by the name of Blue" killed his daughter. It was later determined by the police that the person identified as "Blue" could not have committed the crime.

The appellant testified at trial. He denied that he knew the victim by name or that she came to his house often. And, he denied telling this to Mr. McCray. He also denied being at the McCray residence on Sunday, February 19. However, he did admit that it was he who was working on his Volkswagen on that day. *Held:*

[1] 1. The evidence, when viewed as a whole, is sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[2] 2. The trial judge did not abuse his discretion in setting bail at $10,000. See Code Ann. § 27-901; *Smith v. State*, 245 Ga. 108(2), 263 S.E.2d 910 (1980); *Harris v. Hopper*, 226 Ga. 389, 224 S.E.2d 1 (1976).

[3] 3. The trial judge did not err in overruling the appellant's motion for acquittal on the ground that two grand juries had returned no-bills of indictment. Nor did the trial judge err in overruling his motion to dismiss for denial of the appellant's constitutional right to a speedy trial.

The appellant was arrested on May 26, 1978. On December 10, 1978, he filed a demand for indictment, and on April 4, 1979, he was ordered released from incarceration pursuant to his writ of habeas corpus for failure of the grand jury to indict him. It appears that the grand jury deferred voting on the bill of indictment against the appellant in order to permit the district attorney further time for investigation; in that a key witness, Diane Knight, could not be located. On October 3, 1979, the grand jury returned a bill of indictment against the appellant for murder. This case came on for trial on February 27, 1980.

It is true that two returns of no bills by a grand jury generally bars further prosecution for the same offense. Code Ann. § 27-702. However, a mere failure of the grand jury to indict does not constitute the return of a no bill. *Chafin v. Jones*, 243 Ga. 267, 253 S.E.2d 389 (1979). Accordingly, the trial judge did not err in overruling the appellant's motion for acquittal.

[4, 5] Nor do we find the appellant's Sixth Amendment right to a speedy trial to have been violated. *Barker v. Wingo*, 407 U.S. 515, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), sets out the factors for determining whether there has been a denial of the Sixth Amendment right to speedy trial:

(1) *Length of delay*—The length of delay between appellant's arrest and his trial was 22 months. However, during some of this time he was in jail under a conviction of involuntary manslaughter. He was released on habeas corpus approximately 10 months prior to trial.

(2) *Reason for delay*—The reason for the delay in the return of the indictment was that a key witness could not be located. This is a legitimate reason for delay and does not constitute deliberate prosecutorial delay for tactical advantage. Cf., *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *Haisman v. State*, 242 Ga. 896(2), 252 S.E.2d 397 (1979).

(3) *Assertion of right*—The appellant asserted his right to speedy trial by filing a demand for indictment several months after his arrest.

(4) *Prejudice*—The appellant was released approximately 10 months prior to trial, and during the approximately 10 months he was in jail, he was serving time on another charge. He has not shown any way in which his defense was impaired by the delay.

Considering all of these factors, we hold that the trial judge did not abuse his discretion in ruling that the appellant has not been denied his Sixth Amendment right to a speedy trial. See *Jackson v. State*, 244 Ga. 276(2), 260 S.E.2d 15 (1979).

4. After an in-camera inspection of the prosecutor's files, the trial judge supplied the defense with all evidence found to be material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In addition, the prosecutor provided the defense with all writings and tangible objects required to be produced under the appellant's Code Ann. § 38-801(g) notice to produce. *Hamby v. State*, 243 Ga. 339(2), 253 S.E.2d 759 (1979); *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976). The appellant has not made a showing of any evidence withheld under *Brady* or any material which was required to be, but not, produced under the notice to produce. We find no error here.

[6] 5. Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, *Bowden v. Zant*, 244 Ga. 260(15C), 260 S.E.2d 465 (1979), the appellant did receive notice of the state's intent to proceed under § 27-2534.1(b)(7) here.

[7] 6. The trial judge did not abuse his discretion in overruling the motion for change of venue.

There is no evidence in the record that there was such widespread, adverse, pretrial

publicity that the prospective jurors could not lay aside their opinions and render a verdict based solely on the evidence. Only 38 prospective jurors were examined before a jury was struck, and only seven of these prospective jurors were excused for being prejudiced or having a fixed opinion as to guilt or innocence. This low dismissal rate corroborates the absence of such prejudicial pretrial publicity as would require the grant of the appellant's motion for change of venue. *Murphy v. Florida*, 421 U.S. 907, 95 S.Ct. 1555, 43 L.Ed.2d 772 (1974); *Tucker v. State*, 244 Ga. 721(12), 261 S.E.2d 635 (1979); *Collier v. State*, 244 Ga. 553, 572, 261 S.E.2d 364 (1979). In addition, the prospective jurors were carefully questioned in order to ensure that the jurors selected to try the case were not prejudiced by pretrial rumors. See *Chenault v. State*, 234 Ga. 216(5), 215 S.E.2d 223 (1975).

[8] 7. Two prospective jurors were properly excused for cause under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This did not deprive the appellant of his right to a jury selected from a representative cross-section of the community. *Bowen v. State*, 244 Ga. 495(3), 260 S.E.2d 855 (1979).

[9] 8. The trial judge did not commit error in refusing to strike for cause a prospective juror who stated on voir dire that he believed the burden of proof on the state to be too high, in that this prospective juror further stated that he could lay aside his personal opinions as to the burden of proof that the state had to bear and follow whatever instructions the trial court might give him as to the burden of proof.

[10] 9. The photographic array shown to Sabrina Williams by the police was not impermissibly suggestive. Therefore, the trial judge did not err in overruling the appellant's motion to suppress Sabrina's pretrial identification of the appellant from the photographic array. *McClesky v. State*, 245 Ga. 108(2), 263 S.E.2d 146 (1980); *Gravitt v. State*, 239 Ga. 709(4), 239 S.E.2d 149 (1977).

[11] Nor can we say that the trial judge committed error in allowing a photograph of the appellant to be introduced as an exhibit at trial, in that the trial judge found that this was the photograph which Sabrina Williams had picked out of the photographic array.

[12] 10. The trial judge did not abuse his discretion in admitting transcripts of pretrial statements given by the appellant to the police. *United States v. Wilson*, 578 F.2d 67 (5th Cir. 1978).

Defense counsel sought to have tape recordings of these statements admitted in lieu of the transcripts, because the defense asserted that the voice inflections of the appellant and those conducting the interrogation would reveal the confusing nature of the interrogation. The tapes were played to the jury, but portions of the tapes were unintelligible. The trial judge then allowed the transcripts to be read into evidence. No objection was made by defense counsel at trial. We find no abuse of discretion on the part of the trial court in admitting the transcripts.

[13] 11. The trial judge's failure to give the appellant's request to charge under *Williams v. State*, 11 Ga.App. 662, 75 S.E.2d 988 (1912), was not error.

Williams holds that without corroboration one cannot be convicted of a crime upon hearsay testimony as to statements of a child who is incompetent as a witness because too young to appreciate the nature and sanctity of the oath. In this case, there is corroboration of Sabrina Williams' testimony and her pretrial statements. In addition, she was not found to be incompetent as a witness. Therefore, the pronouncements of law in *Williams* are not correct statements of law as applied to the facts of this case. Accordingly, the trial judge did not err in refusing to give the request to charge. *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 565 (1980).

[14] 12. Since the appellant's other requests to charge were given in substance by

the trial judge, the failure to charge in exactly the language requested was not error. E. g., *Mason v. State*, 236 Ga. 46(5), 222 S.E.2d 339 (1976).

[15] 13. The trial judge did not abuse his discretion in admitting in evidence at the presentence hearing, photographs depicting the injuries to the victim. E. g., *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1979); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979).

14. The trial judge correctly charged the jury on mitigating circumstances at the presentence hearing. See *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979).

[16] 15. Imposition of the death penalty on circumstantial evidence alone is not unconstitutional. *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977), cert. denied, *Douthit v. Georgia*, 445 U.S. 933, 100 S.Ct. 1332, 63 L.Ed.2d 772 (1980).

The jury was charged on circumstantial evidence and the reasonable hypothesis rule pursuant to Code § 38-109. We agree that the evidence excludes every reasonable hypothesis save that of guilt.

[17] 16. The appellant's consecutive life sentences for rape and aggravated sodomy do not violate the Eighth Amendment's ban on cruel and unusual punishment. *Crawford v. State*, 236 Ga. 491, 224 S.E.2d 365 (1976).

17. Georgia's death penalty statute has been held on numerous occasions to be constitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *Willis v. State*, 243 Ga. 185(10), 253 S.E.2d 70 (1979).

[18] 18. The method of execution in this state does not constitute cruel and unusual punishment. *Collier v. State*, 244 Ga. 553(18), 261 S.E.2d 364 (1979).

[19] 19. The trial judge did not err in admitting the evidence concerning Alphonso Swinton. The evidence introduced included proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm. Swinton was the appellant's roommate. In order for the state to prove its case against the appellant, it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder. The evidence concerning Swinton was, therefore, relevant to the issue of the appellant's guilt or innocence of the murder charge.

Sentence Review:

From a review of the record and transcript, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[20] In this case, the evidence shows that the appellant brutally murdered a six-year-old girl through the infliction of multiple stab wounds. Prior to being killed, the victim was raped and sodomized. Her vagina, rectum, as well as other parts of her body, were severely bruised and bleeding; her lips were torn from her teeth (lacerations or tears of her lips); and it took approximately 30 minutes after the infliction of a deep stab would to her chest for her to bleed to death. From the evidence, the jury was fully authorized in finding that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." See generally *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339, supra. The verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support the affirmance of the death penalty in this case. The appellant's sentence to death for murder is not excessive or disproportionate, considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur, except as to Division 5.

HILL, P. J., concurs specially.

GREGORY, J., not participating.

APPENDIX

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978); *Griggs v. State*, 241 Ga. 317, 245 S.E.2d 269 (1978); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1978); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980); *Hill v. State*, 246 Ga. 402, 271 S.E.2d 802 (1980); *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980).

HILL, Presiding Justice, concurring specially.

I concur specially as to divisions 5 and 15.

(5) Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, *Bowden v. Zant*, division 15C, supra, the state is required to make known to the defendant prior to the beginning of the trial the additional *evidence* it will introduce in aggravation of punishment during the sentencing phase of trial. Code § 27-2503. I therefore concur in division 5 of the majority opinion in this case. See *Bowden v. Zant*, supra, Hill, J., concurring specially, 244 Ga. at 265, 260 S.E.2d 465.

(15) In this case the evidence is circumstantial as to the defendant's guilt, not as to the aggravating circumstance. Compare *Douthit v. State*, 239 Ga. 81(6), 235 S.E.2d 493 (1977). The evidence as to the aggravating circumstance was direct (multiple stab wounds, etc.). Thus, in this case the circumstantial evidence issue directly affects only the defendant's conviction.

Convictions based upon circumstantial evidence are not unconstitutional, so long as "... the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of ... guilt....", Code § 38-109, and so long as, after viewing the evidence in the light most favorable to support the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See divisions 1 and 15 of the majority opinion.

Like this court, other courts have affirmed death penalties where the evidence of guilt was circumstantial. *State v. Peery*, 199 Neb. 656, 261 N.E.2d 95, 100 (1977), cert. den. 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978); *Thomas v. State*, 374 So.2d 508, 513 (Fla.1979), cert. den. 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *State v. Carriger*, 123 Ariz. 335, 599 P.2d 788 (1979), cert. den. 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

I therefore concur in division 15 of the majority opinion.

AUTHORITIES INVOLVED

The Constitution of the United States of America, amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The Constitution of the United States of America, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Constitution of the United States of America, amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Constitution of the United States of America, amendment XIV, section 1:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ga. Code Ann. § 24-3319 (argument of law and fact):

> Arguments of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals.

Ga. Code Ann. § 26-1101 (murder):

> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied

where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Ga. Code Ann. § 26-1305 (aggravated battery):

A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.

Ga. Code Ann. § 26-2001 (rape):

A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 26-2002 (aggravated sodomy):

A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits aggravated sodomy when he commits sodomy with force and against the will of the other person. A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 26-3102 (capital offenses; jury verdict and sentence):

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death

is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Ga. Code Ann. § 27-2503 (presentence hearings in felony cases):

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may by imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the

court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27- 2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Ga. Code Ann. § 27-2534.1 (mitigating and aggravating circumstances; death penalty):

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

Ga. Code Ann. § 27-2537 (review of death sentences):

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the

record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decisions, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Ga. Code Ann. § 38-109 (circumstantial evidence):

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

Ga. Code Ann. § 70-207 (requests to charge; time for objections; time for presentation of request; disposition of refused requests; appellate review of erroneous charges with or without objection):

(a) Except as otherwise provided in this section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury, unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and objection need not be made with the particularity of assignments of error (abolished by this law) and need only be as reasonably definite as the circumstances will permit. The provisions of this section shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not.

80-6749

JUN 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF GEORGIA

ATLANTA, February 24, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GARY X. NELSON V. THE STATE

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Gregory, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, June 15, 1981

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

AUTHORITIES INVOLVED

The Constitution of the United States of America, amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The Constitution of the United States of America, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Constitution of the United States of America, amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Constitution of the United States of America, amendment XIV, section 1:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ga. Code Ann. § 24-3319 (argument of law and fact):

> Arguments of counsel shall be confined to the law and the facts involved in the case then before the court, on pain of being considered in contempt; and in all civil cases questions of law shall be argued exclusively to the court, and questions of fact to the jury. Counsel shall not be permitted, in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto, in decisions by the Supreme Court or Court of Appeals.

Ga. Code Ann. § 26-1101 (murder):

> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied

where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Ga. Code Ann. § 26-1305 (aggravated battery):

A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.

Ga. Code Ann. § 26-2001 (rape):

A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 26-2002 (aggravated sodomy):

A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits aggravated sodomy when he commits sodomy with force and against the will of the other person. A person convicted of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

Ga. Code Ann. § 26-3102 (capital offenses; jury verdict and sentence):

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death

is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Ga. Code Ann. § 27-2503 (presentence hearings in felony cases):

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may by imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the

court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27- 2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

Ga. Code Ann. § 27-2534.1 (mitigating and aggravating circumstances; death penalty):

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

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(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the

record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decisions, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

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Ga. Code Ann. § 70-207 (requests to charge; time for objections; time for presentation of request; disposition of refused requests; appellate review of erroneous charges with or without objection):

(a) Except as otherwise provided in this section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury, unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury, and objection need not be made with the particularity of assignments of error (abolished by this law) and need only be as reasonably definite as the circumstances will permit. The provisions of this section shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not.

MAY 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Supreme Court, U.S.
FILED
MAY 26 1981
Alexander L. Stevas, Clerk

GARY X. NELSON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
TO SEEK A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF GEORGIA

Pursuant to Rule 46 of the Supreme Court Rules, petitioner Gary X. Nelson moves for leave to proceed in forma pauperis to seek a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia affirming petitioner's convictions and death sentence. Attached is an affidavit in the form prescribed in the Federal Rules of Appellate Procedure, Form 4, setting forth with particularity facts showing that petitioner comes within the statutory requirements. See 28 U.S.C. § 1915. Petitioner was represented by appointed counsel in the trial court and on appeal to the Georgia Supreme Court.

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant the motion for leave to proceed in forma pauperis.

May 26, 1981

Richard H. Sayler

Richard H. Sayler

Allan R. Freedman

Allan R. Freedman

Counsel of Record for
Petitioner Gary X. Nelson

30 Rockefeller Plaza
New York, New York 10112
(212) 489-4100

Of Counsel:

Doris K. Shaw
Robert Garcia
Clifford Richner
Donovan Leisure Newton & Irvine

RECEIVED
MAY 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARY X. NELSON

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, GARY X. NELSON being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 10-3-79 PER month $936.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. (None)

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Gary X. Nelson

GARY X, NELSON

STATE OF GEORGIA
COUNTY OF Chatham

SUBSCRIBED AND SWORN TO
before me this the 20 day of March, 1981.

Joseph S. Cafiero

My Commission expires:

JOSEPH S. CAFIERO, III
Notary Public, Chatham County, Ga.
My Commission Expires June 23, 1984

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARY X. NELSON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 28, I hereby certify that I am a member of the Bar of this Court and that I served this motion to proceed in forma pauperis pursuant to Supreme Court Rule 46 upon respondent by placing a copy in the United States mail with first class postage prepaid, addressed to:

John C. Walden
Senior Assistant Attorney General
Attention: Charles E. Brown
132 State Judicial Building
40 Capital Square, S.W.
Atlanta, Georgia 30334

Robert W. Hitch, III, Esq.
Assistant District Attorney
400 Chatham County Courthouse
133 Montgomery Street
Savannah, Georgia 31401

Joline B. Williams, Clerk
Supreme Court of Georgia
Room 506
State Judicial Building
Atlanta, Georgia 30334

Done this 26th day of May, 1981.

Allan R. Freedman, Esq.